88-1180

Supreme Court, U.S.
FILED
JAN 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

UTILITY WORKERS UNION OF AMERICA, AFL-CIO, LOCAL NO. 246, and ALAN ROOK,
Petitioners,

v.

SOUTHERN CALIFORNIA EDISON COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Under § 301 of the Labor Management Relations Act, can an employer-defendant entirely preclude employee plaintiffs from pursuing a state law cause of action, the elements of which can be established without reference to or interpretation of the collective bargaining agreement covering the employees, by merely alleging as an affirmative defense the contention that the employees' union waived the state law protection in the collective bargaining agreement?

2. Is a state law cause of action against an employer preempted by § 301 of the Labor Management Relations Act as "substantially dependent" upon or "inextricably intertwined" with the collective bargaining agreement where the cause of action can be established without reference to or interpretation of the collective bargaining agreement, but concerns a working condition that either is, or could be, covered by the collective bargaining agreement?

3. (a) Is a state law protecting individual employees waivable through a collective bargaining agreement simply because the law concerns subject matter that is within the proper scope of collective bargaining under federal law?

(b) If so, can the state law protection be waived without clear and unmistakable evidence that a waiver was intended?

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SOUTHERN CALIFORNIA EDISON COMPANY,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Utility Workers Union of America, AFL-CIO, Local 246, and Alan Rook pray that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this matter on August 19, 1988.[1]

OPINIONS BELOW

The order and amended opinion of the Court of Appeals for the Ninth Circuit is reported at 852 F.2d 1083 (1988) and is reprinted in the appendix hereto, App. A, p. 1a,

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[1] Because Jeanette Cintron, a plaintiff-appellant aligned with petitioners below, is no longer employed by respondent, this matter is now moot as to her. Thus, she does not join in this petition.

infra. The Ninth Circuit's order denying petitioners' petition for rehearing and suggestion for rehearing *en banc* has not been reported; it is reprinted in the appendix hereto, App. B, p. 12a, *infra.*

The memorandum order to show cause re remand of the United States District Court for the Central District of California (Hupp, D.J.) has not been reported; it is reprinted in the appendix hereto, App. C, p. 13a, *infra.*

JURISDICTION

The Ninth Circuit entered initial and amended opinions on May 4 and August 19, 1988, respectively. Petitioners' petition for rehearing and suggestion for rehearing *en banc* was denied in an order entered on October 18, 1988.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

29 U.S.C. § 185(a). *Suits by and against labor organizations.*

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Constitution of California, Article 1, § 1. *Inalienable rights.*

> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

Constitution of California, Article 1, § 13. *Searches and seizures; warrant.*

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

STATEMENT OF THE CASE

Petitioner Alan Rook is an employee of respondent Southern California Edison Company ("SCE" or "the employer"); petitioner Utility Workers Union of America, AFL-CIO, Local 246 ("the Union"), represents Rook and his fellow SCE employees.

In December 1986, the employer instituted a random urinalysis program. Pursuant to that program Rook and other employees represented by the Union were subject to testing for drug use at random, without cause, and on less than 24 hours' notice. When the testing program was instituted petitioners brought an action in the state court seeking to enjoin the program.

The complaint asserted discrete claims under (1) the California Constitution, Article 1, §§ 1 and 13, alleging violation of state constitutional rights of privacy and of freedom from unreasonable search and seizure, and (2) Labor Management Relations Act ("LMRA") § 301, 29 U.S.C. § 185, for an order preserving the *status quo* pending arbitration of a grievance alleging that the drug-testing program breached the collective bargaining agreement.[2] The state court issued a temporary restraining

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[2] The petitioners are no longer pursuing their claim under § 301 for an order preserving the *status quo* pending arbitration. Although the Ninth Circuit's opinion in this case addresses the propriety of the District Court's issuance of an injunction pending

order on December 10, 1986. Then, because the petitioners' action included a breach of contract claim under LMRA § 301, SCE removed the action to the United States District Court for the Central District of California.

Both in state court prior to removal and in the District Court thereafter, the petitioners alleged that the California constitutional protection of privacy regulates the conduct of private employers, such as SCE; applies in the workplace; and serves to require individualized suspicion prior to an intrusion into privacy of the sort carried out by SCE here. Recognizing that the Article 1, § 1 right of privacy is not absolute, *White v. Davis*, 13 Cal.3d 757, 776, 120 Cal. Rptr. 94 (1975), the petitioners merely sought the opportunity to litigate in the trial court their position as regards the balancing of the respective interests of employer and employee required under the California Constitution.[3] Nothing in petitioners' allegations regarding the state constitutional claims relies in any way on the collective bargaining agreement, or, indeed, on *any* private contract whatsoever; rather,

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arbitration, we invoke the Court's jurisdiction here only as regards the Ninth Circuit's treatment of the petitioners' state constitutional claims.

[3] Article 1, § 1 of the California Constitution confers an "inalienable right" of "privacy." That right has been construed by the state courts as providing protection from both governmental and private invasions of privacy. *Porten v. University of San Francisco*, 64 Cal. App.3d 825, 829, 134 Cal. Rptr. 839 (1976). Whether and to what degree Article 1, § 1 protects employees of private employers from particular forms of drug-testing has not yet been decided by any California appellate court.

Petitioners also seek to enforce rights under Article 1, § 13 of the California Constitution, the provision establishing the right to freedom from unreasonable search and seizure. For purposes of the analytical inquiry here as regards § 301 preemption, there is no reason to address Article 1, § 13 separately. Thus, for convenience we limit our discussion to Article 1, § 1, the privacy provision.

petitioners claim a state constitutional right that is entirely independent of any contractual relationship.

Whether the state constitution in fact protects employees from drug-testing either generally or in the circumstances of this case was never decided. Instead, the petitioners' efforts to assert and enforce state constitutional rights were extinguished by the District Court at the onset of the litigation. Acting on its own motion, the District Court ordered the parties to show cause why the petitioners' pendent state constitutional claims should not be dismissed, and then dismissed those claims on the ground that they are preempted under LMRA § 301. The District Court found such preemption because SCE asserted *as a defense* that the union waived any state constitutional rights the employees may have had by agreeing to standard, very general safety and management rights provisions in the collective bargaining agreement (App. C, pp. 13a-15a); the District Court did not decide whether the Union in fact waived any state constitutional rights the employees may have had. *Id.*, pp. 19a-20a.

On appeal, the Ninth Circuit held that petitioners' state "constitutional claims are 'substantially dependent' upon analysis of the collective bargaining agreement" and, therefore, preempted under § 301 because (1) resolution of the employer's *defense* that the union waived its members' constitutional rights "rests upon" provisions of the collective bargaining agreement (App. A, p. 6a), and (2) the state constitutional rights at issue are "a proper subject for collective bargaining" and can be "negotiated away." *Id.* In a petition for rehearing, the petitioners argued that the Ninth Circuit's initial opinion in this case was inconsistent with this Court's intervening decision in *Lingle v. Norge Div. of Magic Chef, Inc.*, —— U.S. ——, 108 S.Ct. 1877 (1988). The Ninth Circuit subsequently amended its opinion to add the following:

> The Supreme Court's recent decision in *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S. Ct. 1877 (1988), does not affect our holding. *See Laws v. CALMAT*, No. 87-6150, slip op. 8531, 8540 n.5 (9th Cir. July 12, 1988).

App. A, p. 2a.

In footnote 5 of *Laws*, a case also involving the application of Article 1, § 1 of the California Constitution in the drug-testing context, the Ninth Circuit distinguished *Lingle* on two grounds. First, because "[t]he California courts have not applied in a published opinion the California constitutional right of privacy in a drug-testing context" an Article 1, § 1 claim "is not an established or recognized state law claim." App. D, p. 29a n.5. Second, "we believe *Laws*' claim is inextricably intertwined with his [collective bargaining agreement]." *Id.*[4]

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' PREEMPTION RULING IN THIS CASE IS DIRECTLY CONTRARY TO THIS COURT'S RECENT PRECEDENTS.

The conflict between the Ninth Circuit's approach to LMRA § 301 preemption issues such as this one and this Court's pronouncements is plain, direct, and pervasive. Indeed, the conflict is so extreme that it may not be necessary for this Court to hear this case on the merits. Rather, since the controlling principles have already been announced, this Court can simply inform the Ninth Circuit that it is misreading, or refusing to apply, those principles by summarily reversing this case.

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[4] Since the Ninth Circuit's opinion in this case treats with *Lingle* only by reference to footnote 5 of its opinion in *Laws*, we will discuss *Laws* throughout this petition. For the Court's convenience, we have included the *Laws* opinion in the Appendix, App. D, p. 21a. The opinion is reported at 852 F.2d 430 (1988). No petition for *certiorari* was filed in *Laws*.

A. The Rule of *Caterpillar* and *Lingle*.

The central issue in this case is whether a plaintiff is precluded from pursuing a state law claim where the plaintiff's case in no way rests upon any aspect of the collective bargaining agreement, but the defendant intends to raise *as an affirmative defense* the claim that any state law rights that may exist were waived by the union in a collective bargaining agreement that covers the plaintiff.

In two cases, one in each of the last two terms, this Court squarely addressed this question, and squarely rejected the view adopted by the Court of Appeals here. First, in *Caterpillar Inc. v. Williams*, —— U.S. ——, 107 S. Ct. 2425 (1987), the question before the Court was whether a state law individual employment contract claim asserted by employees who were covered by a collective bargaining agreement is preempted by § 301.[5] The Court began by restating the general proposition, established in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985), and *Electrical Workers v. Hechler*, 481 U.S. ——, —— n.3, 107 S. Ct. 2161, 2166-67 n.3 (1987), that "section 301 governs *claims* founded directly on rights created by collective-bargaining agreements, and also *claims* 'substantially dependent on analysis of a col-

[5] The ultimate question in *Caterpillar* was whether the case was properly removed to federal court. As this Court made clear from the very first line of the *Caterpillar* opinion, however, the removal issue in that case turned entirely upon the question whether or not the claim was preempted by § 301. 107 S. Ct. at 2437 (emphasis supplied) ("The question for decision is whether respondents' state law complaint for breach of individual employment contracts is completely preempted by § 301 of the Labor Management Relations Act of 1947 (LMRA), 61 Stat. 156, 29 U.S.C. § 185, and *therefore* removable to Federal District Court."). The bulk of the *Caterpillar* opinion was consequently devoted to substantive § 301 preemption issues and clearly governs the viability of the substantive pendent state law claims here. Indeed, in this case as well the viability of continued federal jurisdiction may well turn on the answer to the preemption question. *See* n.9, *infra*.

lective-bargaining agreement.'" 107 S. Ct. at 2431 (emphasis supplied). As the emphasized language in the above quotation indicates, the *Caterpillar* Court made clear that the focus in determining § 301 preemption must be upon the plaintiff's cause of action, and not upon any affirmative defenses that the defendant may ultimately seek to establish. *See, e.g.*, 107 S. Ct. at 2431 (emphasis supplied) ("[plaintiffs'] *complaint* is not substantially dependent upon interpretation of the collective-bargaining agreement. *It* does not rely upon the collective agreement indirectly, nor does *it* address the relationship between the individual contracts and the collective agreement").

In *Caterpillar* the Court squarely addressed the employer's *defensive* § 301 preemption argument, namely, that any individual rights the plaintiffs may have had under state law were waived by the collective bargaining agreement. The Court recognized that "[i]t is true that when a defense to a state claim is based on the terms of a collective-bargaining agreement, the state court will have to interpret that agreement to decide whether the state claim survives." 107 S. Ct. at 2433. It also indicated that raising the question whether such waiver (1) was permissible and (2) had actually occurred in a specific instance might well reveal "the presence of a federal question, even a § 301 question." *Id.* But the Court maintained that "a *defendant* cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law . . . ." 107 S. Ct. at 2433. Rather, where a federal contractual *defense* is raised, that defense can be decided in due course on the merits under federal law, without pretermitting entirely the plaintiff's right to pursue his or her state cause of action.[6] 107 S. Ct. at 2433.

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[6] It is critical to note that the Court of Appeals in this case did *not* proceed in this fashion. That is, neither the district court nor

The Court returned to this question in *Lingle v. Norge Div. of Magic Chef, Inc.*, —— U.S. ——, 108 S. Ct. 1877 (1988). In *Lingle*, once again, the general issue was whether a state cause of action—in that instance, a state cause of action for retaliatory discharge for filing a workers' compensation claim—that could be pleaded and proven by the plaintiff without regard to a collective bargaining agreement was preempted by § 301. The Court reiterated that there is no § 301 preemption "as long as the state-law *claim* can be resolved without interpreting the agreement itself." 108 S. Ct. at 1883 (emphasis supplied). Where a case brought under state law involves "both the interpretation of a collective-bargaining agreement and a separate state law analysis that does not turn on the agreement . . . federal law would govern the interpretation of the agreement, but the separate state law analysis *would thereby be preempted.*" 108 S. Ct. at 1885 n.12 (emphasis supplied). The Court in *Lingle* noted in particular that an affirmative waiver *defense* that may require construing the collective bargaining agreement does not usurp a plaintiff's right to litigate a state cause of action; rather, "[w]hether a union may *waive* its members' individual, state-law rights, *is . . . a question distinct from that of whether the claim is preempted under § 301 . . . .*" 108 S. Ct. at 1883 n.9 (second emphasis supplied).

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the Court of Appeals ever decided (1) whether plaintiffs had in fact stated a viable cause of action under the California Constitution privacy provisions; (2) whether such a cause of action is waivable *under California law*, either by individuals or by a collective bargaining agreement; or (3) whether, assuming that federal law waiver principles apply, displace any state rules to the contrary, and permit a union to waive state constitutional rights, the collective bargaining agreement in fact *did* as a matter of federal law constitute a waiver of any state constitutional rights the petitioners may have. All that the Court of Appeals decided in this regard was that if petitioners have any state constitutional privacy rights, they *can* be waived in a collective bargaining agreement. *See* Part II, *infra*.

B. The Ninth Circuit's Attempts to Distinguish *Caterpillar* and *Lingle* Are All Fundamentally Flawed.

Despite these seemingly clear pronouncements, the Ninth Circuit has offered several explanations as to why neither *Caterpillar* nor *Lingle* is controlling on the question of § 301 preemption where the only contract interpretation question involves a waiver defense. Those explanations appear in a case decided shortly after this one, *Laws v. CALMAT*, 852 F.2d 430 (9th Cir. 1988), which was for all relevant purposes identical to this case, and which the Court of Appeals held to be governed by its ruling in this case.[7] The reasons the Ninth Circuit gave in *Laws* as to why *Caterpillar* and *Lingle* do not control the central issue in the present case are each directly contradicted by this Court's cases, and each simply underscores the degree to which the Ninth Circuit so fundamentally misunderstands this Court's recent § 301 preemption cases that summary reversal of the present decision is merited.

1. The Ninth Circuit in *Laws* distinguished *Caterpillar* on two grounds: (1) that "[u]nlike the employees in *Caterpillar*, Laws was a union-represented employee at all times relevant to his claim"; and (2) "[m]oreover . . . [*Laws*'] complaint arises from dissatisfaction with a working condition and disciplinary measures taken to conform to that condition. Thus, his 'rights' are not wholly separate from the [collective bargaining agreement], but are inextricably intertwined with it." App. D, p. 28a; *see also id.*, at 26a ("*Laws*' conditions of employment are governed by the [collective bargaining agreement]. A drug and alcohol testing program . . . is a working condition whether or not it is specifically discussed in the [agreement].").

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[7] No explanation appears in the opinion in this case as to why *Caterpillar* is not controlling, while *Lingle* is dealt with only by reference to *Laws*. App. A, p. 11a.

The first basis given in *Laws* for distinguishing *Caterpillar* was directly refuted in the *Caterpillar* opinion itself: As *Caterpillar* noted, the question whether the employees in *Caterpillar* were or were not "union-represented employee[s] at all times relevant to [their] claim" (App. D, p. 28a) was "disputed" rather than conceded. 107 S. Ct. at 2432 n.12. The Court did not resolve the dispute because its resolution was irrelevant to the § 301 preemption question before it:

> Even if these individual employment contracts were negotiated with respondents *while* the latter were covered by a collective bargaining agreement . . . this fact is irrelevant . . . . For reasons similar to those stated in [the] text . . . respondents' state-law claims . . . would not be transformed into claims arising under federal law.

107 S. Ct. at 2432 n.12.

The second basis given in *Laws* for ignoring the explicit holding of *Caterpillar* graphically illustrates the degree to which the Ninth Circuit has departed from this Court's teachings in this area: The Ninth Circuit's fundamental premise, reflected in this case as well as in *Laws* (App. D, p. 26a), is that conditions of employment which are governed by, or could be governed by, collective bargaining agreements cannot also be the subject of state law regulation. That premise is simply and profoundly wrong, as this Court explicitly held, once again, in *Caterpillar* itself:

> Section 301 does not, as *Caterpillar* suggests, require that all "employment-related matters involving unionized employees" be resolved through collective bargaining and thus be governed by a federal common law created by § 301 . . . . The Court has stated that "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is preempted by § 301 or other provisions of the federal labor law." *Allis-*

> *Chalmers*, 471 U.S. 202, 211 (1985). Claims bearing no relationship to a collective bargaining agreement beyond the fact that they are asserted by an individual covered by such an agreement are simply not preempted.

107 S.Ct. at 2432 n.10. This same point was the linchpin of the *Lingle* opinion:

> [W]hile there may be instances in which the National Labor Relations Act pre-empts state law on the basis of the subject matter of the law in question, *§ 301 pre-emption merely ensures that federal law will be the basis for interpreting collective-bargaining agreements, and says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements.*

108 S.Ct. at 1883 (emphasis supplied).

Despite these two perfectly clear pronouncements, the Ninth Circuit has continued in its view that as long as employees are covered by a collective bargaining agreement, their terms and conditions of employment must be settled through contract negotiations and cannot be governed by state law. Thus, the Ninth Circuit's jurisprudence in this area, as exemplified in this case and in *Laws*, clashes head-on with *Caterpillar* and *Lingle* not only as to the particular relevance of a defense asserting the waiver of state protected rights in a collective bargaining agreement, but also as to the basic standard governing § 301 preemption.

2. The Ninth Circuit in *Laws* nonetheless maintained that its result in this case and in *Laws* is consistent with *Lingle*, reasoning as follows:

> Our holding is consistent with the Supreme Court's recent decision in *Lingle* . . . . The employee's cause of action in *Lingle* alleged violation of a well-established and recognized tort provided to workers under Illinois law . . . . Not only had the state

> courts interpreted the state's Workers' Compensation Act to apply to employees who are parties to a [collective bargaining agreement], the Illinois courts also set forth the specific factual questions for review of such claims . . . . The California courts have not applied in a published opinion the California constitutional right of privacy in a drug-testing context. *Thus Laws' claim is not an established or recognized state law claim.*

App. D, pp. 28a-29a n.5 (emphasis supplied).

Neither *Caterpillar*, nor *Lingle*, nor any other case of this Court suggests that the question whether the federal law governing collective bargaining agreements precludes a particular state law cause of action pleaded by a plaintiff depends upon whether the state cause of action asserted is a venerable one with a recorded pedigree or one asserted for the first time by an imaginative attorney.[8] To the contrary, "§ 301 pre-emption merely ensures that federal law will be the basis for interpreting collective-bargaining agreements, and *says nothing* about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements." *Lingle*, 108 S.Ct. at 1883 (emphasis supplied). Thus, federal labor policy is simply indifferent as to the development of innovative state causes of action in the employment context, as long as the supremacy of federal law in the interpretation of collective bargaining agreements is maintained, and in no way requires the stultification of states' development of new statutory or common law approaches to the protection of employees.

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[8] It is hardly surprising that no published opinions yet exist applying the California constitutional right of privacy in the drug-testing context. The right of privacy was first added to the state constitution in 1972, and employee drug-testing has become widespread only in the last few years.

It is quite possible, of course, that what the Court of Appeals was really saying in *Laws*, and in this case, is that it is skeptical that the state constitutional privacy provision relied on in the two cases precludes employee drug-testing generally, or in the particular contexts before the court in the two cases. And indeed, given the limitations upon California constitutional rights of privacy, it may be that petitioners will not ultimately succeed on the merits of their state law claims. *See* p. 4, *supra*. But that proposition will ultimately be tested only if this case is allowed to proceed to the merits of the state law claim. Similarly, the employer's further contention that the Union in the collective bargaining agreement waived any privacy rights the employees may have had will be heard on the merits only if the case is allowed to proceed.[9]

In contrast, under the Court of Appeals' approach to this case, petitioners could never get their claim that state law protects them from the employer's drug-testing program heard *in any forum*. No grievance concerning the state law claim could have been filed under the con-

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[9] Given the present posture of this case, these issues will likely be resolved in the state court. Because the two courts below held the state claims preempted, they had no occasion to address a remand question. The federal claim to which the state claims were pendent has now expired; thus, if *certiorari* is granted and the preemption ruling reversed, it may well be that remand to state court would be appropriate, since no proceedings on the merits of the state law cause of action have yet taken place.

The current procedural posture of this case makes it more closely analogous to *Caterpillar*, which, like this case, was originally filed in state court, and was removed to federal court. The ultimate issue before the Court in *Caterpillar* was whether removal was proper and remand required. At this juncture the determination of the preemption question in this case may also govern whether or not the case should be remanded to state court. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

tractual grievance-arbitration provision in this regard, since that provision covers only disputes concerning the interpretation or application of the agreement. The arbitrator has no authority to remedy violations of state constitutional rights.

What this Court established in *Caterpillar* and in *Lingle* is that plaintiffs are entitled to their day in court on questions concerning the reach of state law protections, independent of any contractual arrangement. They may not be tossed out of court before those issues are addressed *on their merits.* Because the Ninth Circuit has failed to absorb the message this Court has been sending, and because there has been a myriad of cases in the courts each year in recent years to which that message is pertinent,[10] this Court should grant *certiorari* in this case and summarily reverse the Ninth Circuit. Alternatively (although, as we have stated, we believe that every aspect of the preemption issues in this case has been canvassed by previous decisions of this Court), this Court should grant *certiorari* on this very important and oft-encountered question and grant plenary review.

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[10] One indication of the frequency with which these issues arise is the number of orders vacating lower court judgments issued by this Court one week following the issuance of its decision in *Lingle.* On June 13, 1988, the Court vacated judgments in, and remanded for further consideration in light of *Lingle,* the following cases: *Willoughby v. Central Illinois Light Co.,* —— U.S. ——, 108 S. Ct. 2812 (1988); *Dougherty v. Parsec, Inc.,* —— U.S. ——, 108 S. Ct. 2812 (1988); *Martin v. Carling National Breweries, Inc.,* —— U.S. ——, 108 S. Ct. 2813 (1988); *De Soto v. Yellow Freight Systems, Inc.,* —— U.S. ——, 108 S. Ct. 2813 (1988); *Hanneken v. Dixon Distributing Co.,* —— U.S. ——, 108 S. Ct. 2813 (1988); *Mays v. Reynolds Metal Co.,* —— U.S. ——, 108 S. Ct. 2814 (1988); and *Lastimosa v. Hughes Aircraft Co.,* —— U.S. ——, 108 S. Ct. 2814 (1988). These cases arose from three separate federal circuit courts of appeals and one state supreme court.

II. THE COURT OF APPEALS' RULING REGARDING THE WAIVER OF STATE LAW RIGHTS ALSO IGNORES THIS COURT'S OPINION IN *LINGLE*.

With respect to the question whether the state law rights asserted by the petitioners were waived, the Ninth Circuit made the following cursory holding:

> The question of drug testing obviously implicates important personal rights. To the best of our knowledge, however, no court has held that the right to be free from drug testing is one that cannot be negotiated away, and we decline to make such a ruling here.

App. A, p. 6a. This waiver discussion demonstrates yet another respect in which the Ninth Circuit in this case ignored this Court's express pronouncements in *Lingle*. The Ninth Circuit failed to apply the proper methodology and standard for determining whether the state law rights at issue were *waived*, and then compounded its error by failing to apply the proper methodology and standard for determining whether the state law rights are *waivable*.

In *Lingle*, this Court addressed the waiver problem as follows:

> Before deciding whether [a state law bar to waiver exists and whether] such a state law bar to waiver could be pre-empted under federal law by the parties to a collective-bargaining agreement, we would require "clear and unmistakable" evidence, see *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983), in order to conclude that such a waiver had been intended.

108 S. Ct. at 1883 n.9. Thus, this Court in *Lingle* devised a three-step procedure for resolving claims of waiver.

1. Neither of the courts below addressed on the *merits* the question whether the union "clearly and unmis-

takably" waived its members' state constitutional rights by agreeing to general safety and management rights provisions in the collective bargaining agreement.[11] Nor was the waiver question ripe for resolution. No evidence on that subject was presented; the lower courts had before them only the petitioners' complaint alleging infringement of state constitutional rights and the employer's unsubstantiated assertion that those rights had been waived.

The Ninth Circuit has thus relegated to the arbitral forum the question whether there was in fact a waiver of state law rights. But issues of waiver are not contractual. Rather, as this Court has made clear (*Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 709 n.13 (1983)), questions concerning waiver of statutory rights through collective bargaining agreements require a finding of specific intent on the part of the waiving party to forego a particular statutory right, an intent that must be proven by clear and unmistakable evidence. Since "[a]rbitrators are delegated by . . . collective-bargaining agreements as the adjudicators of contract disputes" (*Lingle*, 108 S.Ct. at 1884 n.11), an arbitration decision simply construing the contract "would not demonstrate that the union specifically intended to waive the statutory protection otherwise afforded . . . ." *Metropolitan Edison Co.*, 460 U.S. at 709 n.13. It is judges, rather, who "can determine questions of state law involving labor-management relations" not requiring the construction of a collective bargaining agreement. *Lingle*, 108 S. Ct. at 1884. Thus, the waiver defense "must be addressed in the first instance by the state [or federal]

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[11] Since the contract clauses upon which the employer is relying to show waiver are only very general clauses relating to plant management and safety, and not specific language relating to drug usage, drug-testing, medical testing, or privacy rights, it seems unlikely that the "clear and unmistakable waiver" standard would be met if the appropriate inquiry were made.

court in which [the employees] filed their claims." *Caterpillar*, 107 S.Ct. at 2433 n.13.[12]

2. Failing to undertake any of the required preliminary inquiries concerning whether waiver was in fact intended, the Ninth Circuit jumped instead directly to the bottom line, holding that the substantive state law rights at issue here are waivable merely because they concern "a proper subject for collective bargaining." App. A, p. 6a. This holding also contradicts this Court's decision in *Lingle*:

> "[P]re-emption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the State. . . . [The] establishment of a minimum labor standard does not impermissibly intrude upon the collective-bargaining process."

108 S.Ct. at 1885 (*quoting Fort Halifax Packing Co. v. Coyne*, —— U.S. ——, 107 S.Ct. 2211, 2215, 2222 (1988)).

Indeed, this Court has held consistently that statutory minimum employment standards cannot be waived in collective bargaining agreements because they provide rights to individual employees independent of those created in the labor contract. In *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 738 (1981),

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[12] This point warrants emphasis. If the question whether state law rights were waived is relegated to the arbitrator (because the mere assertion of such a defense pre-empts the state law claim), and the arbitrator then rejects the defense, holding, for example, that no 'clear and unmistakable' intent to waive was proved, then what happens? The arbitrator has no authority to enforce state law rights, and the employees' state law claims presented to the court have already been dismissed as preempted. The Ninth Circuit's analysis thus gives the employer a surefire procedural gambit: Defend against individual state law claims by asserting a defense of right under the collective bargaining agreement; whether you ultimately win or lose, the mere assertion of your defense secures the extinction of the state law claims.

the Court held that collective bargaining cannot abridge rights under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, because waiver would frustrate the Congressional intent to provide a fair minimum overtime wage. Thus, congressionally granted FLSA rights take precedence over conflicting provisions in a collective bargaining agreement. *Id.*, at 740. The oft-cited reason why these statutory rights are not waivable was stated compellingly in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), a case involving rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*:

> Title VII, on the other hand, stands on plainly different ground [than the statutory rights related to collective activity]; it concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices.

Id., at 51.

Similarly, in *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985), this Court held that federal law does *not* preempt a state statute granting minimum health benefits to employees without regard to union status. The Court reasoned that the primary purpose of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq.*, is to establish an "equitable process" and not to spell out particular substantive terms of the bargain. As long as the goal of state legislation is not antithetical to these general purposes of the NLRA, no incompatibility exists between federal laws favoring collective bargaining and state legislation imposing minimum substantive requirements on negotiated contract terms. *Id.*, at 754-55. The Court reached similar conclusions in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211-13 (1985); *Fort Halifax Packing Co. v. Coyne*, —— U.S. ——, 107 S.Ct. 2211, 2222-23 (1986); *Caterpillar*

Inc. v. Williams, —— U.S. ——, 107 S.Ct. 2425, 2432 n.10 (1986); and *Lingle v. Norge Div. of Magic Chef, Inc.*, 108 S.Ct. 1877, 1883 n.9.

Thus, the mere fact that drug testing issues involve "a proper subject for collective bargaining" cannot possibly establish that any state law protections accorded individual employers in this regard are waivable. In this respect as well, then, the Ninth Circuit has failed to grasp this Court's direction. As *Caterpillar* and *Lingle* indicate, issues concerning the ability of unions to waive individual employees' state-created employment rights are important questions that arise with frequency. Although the Court in *Lingle* merely previewed the methodology for treating with waiver issues, waiver is and will continue to be an active area of dispute in which further clarification is required. If the judgment below is not summarily reversed on other grounds, the Court should grant *certiorari* on this critical and pervasive question and grant plenary review.

III. THE OPINION OF THE NINTH CIRCUIT IN THIS CASE CONFLICTS WITH THAT OF THE SIXTH CIRCUIT IN *SMOLAREK v. CHRYSLER CORP.*, 858 F.2d 1165 (6th Cir. 1988).

The Ninth Circuit's approach to the question whether a defendant can pretermit a decision on the merits of a state law cause of action itself independent of a collective bargaining agreement by introducing a defense implicating the agreement is squarely contrary to that of the Sixth Circuit in *Smolarek v. Chrysler Corp.*, 858 F.2d 1165 (6th Cir. 1988) (*reh'g petition pending*).

In *Smolarek*, the state law cause of action invoked a state statute protecting employees from discrimination on the basis of disability or handicap.[13] The court in *Smo-*

[13] In two cases, the Ninth Circuit also has addressed the question of § 301 preemption of state statutes protecting employees against

larek determined, first, that under the state statute "evaluation of Chrysler's prima facie liability will [not] require determination of whether the collective bargaining agreement has been breached." 858 F.2d at 1170. The court reached this conclusion even though the issue on the merits involved whether the plaintiff should have been reinstated despite a disability leave, and the agreement contained a provision entitled "Reinstatement after Disability." *Id.* Thus, unlike the Ninth Circuit in this case and in *Laws*, the Sixth Circuit understood that, under this Court's cases, a state cause of action is not "substantially dependent" upon or "inextricably intertwined" with a collective bargaining agreement simply because the claim involves matters that "constitute a properly negotiable subject for purposes of collective bargaining." App. A, p. 6a. Rather, as long as the elements of the state cause of action do not depend upon the collective agreement, it is irrelevant whether the parties to that agreement could have, or did cover the subject matter involved in the state claim.

Further, *Smolarek* also addressed directly the pertinence of a federal defense to the § 301 preemption analy-

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discrimination on the basis of handicap or disability, concluding that the state causes of action were not preempted. *Miller v. AT&T Network Systems*, 850 F.2d 543 (9th Cir. 1988); *Ackerman v. Western Electric Co., Inc.*, 860 F.2d 1514 (9th Cir. 1988). Neither *Miller* nor *Ackerman*, however, addressed directly, as did *Smolarek*, the problem that arises when the employer raises a defense that implicates the collective bargaining agreement.

It may well be that the reasoning of *Miller* and *Ackerman* as to the basic import of this Court's § 301 preemption cases is inconsistent with the Ninth Circuit's reasoning in this case and in *Laws*. *See, e.g., Miller*, 850 F.2d at 548. To the degree that is the case, the confusion of the Ninth Circuit on the meaning of *Caterpillar*, *Lingle*, and the other relevant precedents of this Court is all the more clear; obviously, the standard for determining § 301 preemption does not vary depending upon the subject matter of the state cause of action, or upon its novelty. *See* p. 13, *supra*.

sis. The Court in *Smolarek* recognized that "Chrysler may, in its own defense, assert that its treatment of Smolarek was allowed or required by the terms of the collective bargaining agreement and therefore was not based on Smolarek's handicap." 858 F.2d at 1170. The Sixth Circuit, however, ruled that despite "[t]he assertion of a defense requiring application of federal law . . . Smolarek's well-pleaded complaint [does] not arise under federal law or under the collective bargaining agreement." *Id.*[14]

Further, the *Smolarek* court recognized that the mere fact "that Chrysler is likely to assert as its defense . . . that it based its actions on the provisions of the labor agreement" (*id.*) is not sufficient to demonstrate that interpretation of the agreement will be necessary even as part of the defense. Rather, the court concluded that:

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[14] *Smolarek* went on to treat, as somehow separate from the question whether the complaint arises under federal law, the question of § 301 preemption of the state cause of action. 858 F.2d at 1170. In our view, the *Smolarek* court was incorrect on this point: Although *Smolarek* began with the recognition that under the present circumstances "the issues of federal preemption and removability largely merge" (*id.*), the court went on to treat the issues as separate ones. Yet, if the state cause of action were indeed preempted by § 301, then the case would be removable to federal court, because it would then arise under federal law. Put another way, we are not aware of any theory under which a cause of action could be entirely precluded under Section 301, yet not "completely preempted" in the sense that supports removal jurisdiction.

In this case, there is at present no independent basis for federal jurisdiction other than the preemption contention. Thus, if the cause of action is not one that arises under federal law because completely preempted by Section 301, it may well be that the case should be remanded to state court. Consequently, in this case, as in *Smolarek*, the critical question *is* whether plaintiffs' complaint "arise[s] under federal law" (858 F.2d at 1170), even if there is as well some lesser form of Section 301 preemption, as the *Smolarek* court hypothesized.

> In order to resolve the [state law] claim in light of this defense, a court need only decide whether Chrsyler took actions adverse to Smolarek because of his handicap or solely because Chrysler felt bound by the union agreement to take the actions. It is *not* necessary to decide whether or not Chrysler's interpretation of the agreement is correct as a matter of federal labor law. The question is a factual one: What was Chrysler's motivation?

858 F.2d at 1171. So here: the waiver defense in this case at bottom turns upon the union's specific intent to waive state constitutional rights, and not upon any contract question as such. *See* pp. 16-18 & nn.11-12, *supra*. Thus, the *Smolarek* court's recognition that this inquiry does not transform the state law claim into one arising under and preempted by federal law under § 301 is directly at odds with the Ninth Circuit's decision here.[15]

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[15] The Ninth Circuit's flawed analysis here and in *Laws* was adopted by a divided panel of the First Circuit in a similar case arising in the context of an asserted state law right of privacy. In *Jackson v. Liquid Carbonic Corp.*, —— F.2d ——, —— (1st Cir. December 13, 1988), the court relied heavily upon this case and *Laws* for its conclusion that the state law privacy claims are preempted under § 301 by virtue of the mere assertion of the employer's defense that the union "ceded" or "bargained away" the employees' state law rights through the maangement rights provision of the collective bargaining agreement. The dissenting opinion in *Jackson* aptly observes that the majority's holding effectively precludes analysis of the parameters of the state's privacy laws and proscribes the possibility that a state might mandate laws which serve as minimum substantive guarantees not subject to waiver through collective bargaining. *See* pp. 14-18, *infra*.

CONCLUSION

For the reasons stated, the Court should grant this petition for a writ of *certiorari* and summarily reverse the judgment of the Court of Appeals, or, in the alternative, grant *certiorari* and grant plenary review.

Respectfully submitted,

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Dated: January 17, 1989

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 87-5674; 87-5702

D.C. No. CV 86-8250-HLH

UTILITY WORKERS OF AMERICA,
LOCAL NO. 246, AFL-CIO;
JEANETTE CINTRON; ALAN ROOK,
Plaintiffs-Appellants,
Cross-Appellees,

v.

SOUTHERN CALIFORNIA EDISON COMPANY, *et al.*,
Defendant-Appellee,
Cross-Appellants.

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

Argued and Submitted
February 1, 1988—Pasadena, California

Filed May 4, 1988
Amended August 19, 1988

Before: Alfred T. Goodwin, J. Clifford Wallace and
Arthur L. Alarcon, Circuit Judges.

Opinion by Judge Goodwin

ORDER

The opinion filed herein on May 4, 1988, is amended as follows:

Before the last full paragraph on p. 5142 of the slip opinion insert the following paragraph:

> We conclude that the district court erred in issuing a preliminary injunction against implementation of the drug-testing program. A preliminary injunction requiring an employer to preserve the status quo pending arbitration is improper absent either an express or implied-in-fact promise by the employer to do so. *See Amalagamated Transit Union v. Greyhound Lines, Inc.*, 550 F.2d 1237, 1238-39 (9th Cir.) *cert. denied*, 434 U.S. 837 (1977). SCE made no promise, either express or implied in fact, that it would preserve the status quo pending arbitration. In *Greyhound Lines*, we recognized that because an employer's altering the status quo generally will not interfere with the arbitral process, an agreement to submit disputes to arbitration "does not imply a duty on the part of the employer to preserve the status quo pending arbitration." *Id.* at 1238. Hence, arbitration of the dispute will be unaffected by the implementation of the drug-testing program, *see id.* at 1238-39, and there therefore is no need for the issuance of an injunction in aid of arbitration. Furthermore, "the situation can be restored substantially to the status quo *ante*" if the union prevails on its breach of contract claims in arbitration. *Id.* at 1239. We therefore remand to the district court so that the preliminary injunction may be dissolved.

Delete the second to last sentence of the third paragraph on p. 5142: ["The district court lacked jurisdiction over the case . . . SCE's drug testing."] and insert:

> The Supreme Court's recent decision in *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S. Ct. 1877

(1988), does not affect our holding. *See Laws v. CALMAT*, No. 87-6150, slip op. 8531, 8540 n.5 (9th Cir. July 12, 1988).

OPINION

GOODWIN, Circuit Judge:

This case requires us to decide whether section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1982), preempts a union's claim that an employer's unilaterally implemented drug-testing program violates rights guaranteed by the California Constitution.

Utility Workers of America, Local 246, appeals the order dismissing its state constitutional law claims arising out of the implementation of random drug testing of employees by Southern California Edison (SCE) at its San Onofre Nuclear Generating Station. SCE cross-appeals from the district court's refusal to dismiss Local 246's breach of the collective bargaining agreement claim and from its decision to enter a preliminary injunction against random drug testing.[1]

In September 1984, SCE began annual drug-screen urinalysis for all employees seeking "unescorted access" into the security area encompassing the San Onofre plant's nuclear reactors. SCE instituted the drug testing requirement without prior negotiations with Local 246, the collective bargaining agent for employees at the San Onofre facility. Local 246 filed a grievance asserting that institution of the program violated the collective bargaining agreement.

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[1] Appellants ask us to strike portions of appellees' reply brief on the ground that these portions cover subject matter which is beyond the scope of the final brief in a cross-appeal. Although we recognize that the discussion in these portions has peripheral relevance to those matters properly addressed upon cross-appeal, we grant appellants' motion to strike because appellee has had ample opportunity to discuss the claims in its opening brief.

Local 246 also filed a charge with the National Labor Relations Board (NLRB) alleging that SCE's unilateral implementation of the program constituted an unfair labor practice. The NLRB deferred the unfair labor practice charge to arbitration, and Local 246 failed to pursue that matter further.

Beginning about December 1, 1986, SCE modified its drug-testing program. Under the new system, plant employees—chosen at random by a computer—would be required to produce urine samples for testing on one day's notice. SCE implemented the modifications without first bargaining with Local 246.

On December 8, 1986, Local 246 filed a grievance asserting that SCE violated the collective bargaining agreement by instituting the random drug-testing program without first bargaining in good faith. Local 246 concedes that this grievance now is proceeding in accordance with the grievance-resolution mechanisms created by the collective bargaining agreement.

On December 10, 1986, Local 246 and two plant employees filed an action against SCE in state court, alleging that the drug-testing program violated rights guaranteed under the California Constitution to privacy and freedom from unreasonable searches and seizures. *See* Cal. Const. art. I, § 1 (right to privacy); *id.* art. I, § 13 (prohibition of unreasonable searches and seizures). The complaint also alleged that SCE had violated the collective bargaining agreement and sought injunctive and declaratory relief.

After the state court issued a temporary restraining order enjoining random drug testing, SCE removed the case to federal district court. On February 11, 1987, the district court issued an order dismissing the state constitutional claims as preempted by section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1982). The district court also issued a preliminary in-

junction against implementation of random drug testing, pending resolution of the grievance. Each party has appealed from the part of the order unfavorable to it.

We review de novo the question whether section 301 preempts state law. *See Vincent v. Trend Western Technical Corp.*, 828 F.2d 563, 565 (9th Cir. 1987). We begin, as always, with the language of section 301:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties . . . .

29 U.S.C. § 185(a) (1982).

Section 301 "expresses a federal policy that the substantive law to apply in § 301 cases 'is federal law, which the courts must fashion from the policy of our national labor laws.'" *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985) (*quoting Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957)). The preemptive force of section 301 "is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Caterpillar Inc. v. Williams*, 107 S.Ct. 2425, 2430 (1987) (*quoting Metropolitan Life Ins. Co. v. Taylor*, 107 S.Ct. 1542, 1547 (1987)).[2]

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[2] Because § 301 requires courts to create federal law, federal jurisdiction is not barred by the well-pleaded complaint rule, under which a defendant may remove a case based upon federal jurisdiction only where a federal question would appear on the face of the plaintiff's properly pleaded complaint. *See Gully v. First Nat'l Bank in Meridian*, 299 U.S. 109, 112-13 (1936). Even if state law would provide a cause of action in the absence of section 301, preemption under section 301 creates an exclusively federal cause of action. *See Franchise Tax Board of California v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983).

Preemption of state-law claims is inappropriate where state causes of actions "confer[] nonnegotiable state-law rights on . . . employees independent of any right established by contract." *Allis-Chalmers*, 471 U.S. at 213. "[W]hen resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim . . . or dismissed as pre-empted by federal labor-contract law." *Id.* at 220.

Local 246's constitutional claims are "substantially dependent" upon the analysis of the collective bargaining agreement and they constitute a properly negotiable subject for purposes of collective bargaining. Resolution of the issue whether Local 246 has bargained away its members' claimed constitutional rights must rest upon Articles VI and X.N of the collective bargaining agreement, which recognizes SCE's rights to manage the plant, to direct the working force, and to implement reasonable safety rules and require their observance. Thus, we find that Local 246's state-law claims cannot be resolved without reference to the collective bargaining agreement and that they should therefore be dismissed as preempted by section 301.

Drug testing does not implicate the sort of "nonnegotiable state-law rights" that preclude preemption under section 301. *See Allis-Chalmers*, 471 U.S. at 213. As Local 246 argued when it filed its charge of unfair labor practices in 1984, an employer's decision to institute a drug-testing program is a proper subject for collective bargaining. The question of drug testing obviously implicates important personal rights. To the best of our knowledge, however, no court has held that the right to be free from drug testing is one that cannot be negotiated away, and we decline to make such a ruling here.[3]

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[3] Our conclusion is not altered by the recent decisions in *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir. 1988),

We reject Local 246's argument that *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 862-63 (9th Cir. 1987), petition for cert. filed Nov. 25, 1987, mandates a finding that its claims are not preempted by section 301. The *Paige* court, in holding that section 301 did not preempt a tort action based upon California's OSHA regulations, found that a private right of action was created to enforce this state regulatory scheme, not to regulate the employment relationship. *See id.* at 863. Thus the court held that this private right of action "exists independent of any contractual right." *Id.* Here, however, the constitutional rights claimed by Local 246 pose a "significant threat to the collective bargaining process" and promote no "state interest in protecting the public transcending the employment relationship." *Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993, 1001-02 (9th Cir. 1987) (interpreting *Paige*). *Paige* therefore is inapplicable to this case.

We also find inapposite our recent decision in *Tellez v. Pacific Gas and Elec. Co.*, 817 F.2d 536, 539-40 (9th Cir.), *cert. denied*, 108 S.Ct. 251 (1987). *Tellez* held

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or the companion cases of *Brotherhood of Locomotive Eng'rs v. Burlington N. R.R. Co.*, 838 F.2d 1087 (9th Cir. 1988), and 838 F.2d 1102, *petition for cert. filed*, 56 U.S.L.W. 3720 (April 1, 1988) (9th Cir. 1988) Although *Burnley's* holding that drug testing of railway employees violated the fourth amendment suggests the importance of the rights asserted here, *see Burnley*, 839 F.2d at 579-82, this determination in no way suggests that such rights are nonnegotiable; the prevalence of collective bargaining agreements authorizing searches of employees' possessions strongly suggests that drug-testing provisions would be negotiable. The panel's finding in the two *Burlington Northern* cases that the dispute was major rested not upon the importance of the issue but upon the fact that the issue was "neither contemplated nor arguably covered" by a collective bargaining agreement. *Burlington Northern*, at 1091 (*quoting International Ass'n of Machinists v. Aloha Airlines, Inc.*, 776 F.2d 812, 816 (9th Cir. 1985)). These recent cases therefore do not hold that nonnegotiable constitutional rights preclude unions from bargaining over employer drug-testing programs.

that section 301 does not preempt claims alleging intentional and negligent infliction of emotional distress where the collective bargaining agreement "is silent on working conditions, and vague on disciplinary formalities" so that "examination or interpretation of the agreement would not help to resolve [plaintiff's] claim." *Id.* at 539. Here, by contrast, we have found it necessary to examine the collective bargaining agreement to determine whether it has been breached.

We reach the same result as the other courts that have considered the question whether section 301 preempts state-law claims brought to seek invalidation of an employer's drug-testing program, including those founded on state privacy claims. *See Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253, 256 (4th Cir. 1987); *Strachan v. Union Oil Co.*, 768 F.2d 703, 704-06 (5th Cir. 1985); *Association of Western Pulp and Paper Workers v. Boise Cascade Corp.*, 644 F. Supp. 183, 186-87 (D. Or. 1986). Although these cases involved state tort claims rather than state constitutional claims, the Supremacy Clause declares the primacy of federal law over state constitutional provisions as well as over state common and statutory law. *See* U.S. Const. art. VI, cl. 2.

We therefore affirm the district court's finding that section 301 preempts Local 246's state-law challenges to SCE's drug testing program, notwithstanding that its claims are based on rights guaranteed under the California Constitution. This holding makes it unnecessary for us to consider SCE's claims that Local 246's state-law claims are preempted because the San Onofre plant is located on a federal enclave or because the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296 (1982 & Supp. III 1985), grants exclusive legislative power over the facility to the federal government.

The district court held that it had concurrent jurisdiction with the NLRB over Local 246's claim that SCE breached the collective bargaining agreement by institut-

ing a unilateral change in terms and conditions of employment and by refusing to bargain over such changes. The misconduct alleged by Local 246 also would constitute unfair labor practices in violation of sections 8(a)(1) and 8(a)(5) of the NLRA.[4] *See* 29 U.S.C. § 158(a)(1) (1982); 29 U.S.C. § 158(a)(5) (1982). Indeed, Local 246's claim for breach of contract is based upon SCE's alleged violation of Article I of the collective bargaining agreement, which provided that "[t]he Company agrees to recognize the rights of employees as set forth in Section 7 of the National Labor Relations Act."

"When an activity is arguably subject to § 7 or § 8 of the Act, . . . federal courts must defer to the exclusive competence of the National Labor Relations Board." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). However, district courts have concurrent jurisdiction with the Board in cases where an alleged unfair labor practice also violates a collective bargaining agreement. *See Smith v. Evening News Ass'n*, 371 U.S. 195, 197 (1962).

We find it unnecessary to determine whether the NLRA preempts Local 246's claims. "The usual rule in the field of labor law is that where administrative procedures have been instituted for the resolution of disputes between parties to a collectively bargained or other agreement, the courts will generally require the exhaustion of those pro-

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[4] On September 8, 1987, the NLRB's Office of the General Counsel recommended that drug testing for current employees and job applicants be deemed a mandatory subject of bargaining under section 8(d) of the NLRA, 29 U.S.C. § 158(d) (1982). *See* Office of the General Counsel to the National Labor Relations Board, Memorandum GC 87-5 (Sept. 8, 1987). Because we find that federal courts lack jurisdiction at this time to determine whether SCE has violated the collective bargaining agreement, we need not consider the issues whether the General Counsel's recommendation should be applied retroactively or whether SCE's existing drug-testing program permitted it to modify the program without bargaining.

cedures before exercising the jurisdiction they might otherwise have over disputes subject to resolution through said procedures." *Amato v. Bernard*, 618 F.2d 559, 566 (9th Cir. 1980).

Federal labor policy places great weight upon ensuring the availability of grievance procedures as "a uniform and exclusive method for orderly setlement of employee grievances." *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965). "Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960). "A rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, . . . as well as eviscerate a central tenet of federal labor-contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance." *Allis-Chalmers*, 471 U.S. at 220.

Because Local 246 has not complied with available grievance procedures, the district court could not hear the union's claim for breach of the collective bargaining agreement even if it shares jurisdiction with the NLRB. Accordingly, we reverse the part of the district court's order declining to dismiss Local 246's claim for breach of contract.

We conclude that the district court erred in issuing a preliminary injunction against implementation of the drug-testing program. A preliminary injunction requiring an employer to preserve the status quo pending arbitration is improper absent either an express or implied-in-fact promise by the employer to do so. *See Amalgamated Transit Union v. Greyhound Lines, Inc.*, 550 F.2d 1237, 1238-39 (9th Cir.) *cert. denied*, 434 U.S. 837 (1977). SCE made no promise, either express or implied

in fact, that it would preserve the status quo pending arbitration. In *Greyhound Lines*, we recognized that because an employer's altering the status quo generally will not interfere with the arbitral process, an agreement to submit disputes to arbitration "does not imply a duty on the part of the employer to preserve the status quo pending arbitration." *Id.* at 1238. Hence, arbitration of the dispute will be unaffected by the implementation of the drug-testing program, *see id.* at 1238-39, and there therefore is no need for the issuance of an injunction in aid of arbitration. Furthermore, "the situation can be restored substantially to the status quo *ante*" if the union prevails on its breach of contract claims in arbitration. *Id.* at 1239. We therefore remand to the district court so that the preliminary injunction may be dissolved.

We affirm the part of the district court's order dismissing Local 246's claims that SCE's drug-testing program violates the California Constitution because the state causes of action are preempted by section 301. We reverse the part of the district court's order finding federal jurisdiction over Local 246's claims for breach of contract because Local 246 has failed to exhaust available grievance procedures. The Supreme Court's recent decision in *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S. Ct. 1877 (1988), does not affect our holding. *See Laws v. CALMAT*, No. 87-6150, slip op. 8531, 8540 n.5 (9th Cir. July 12, 1988). The case is remanded to the district court with instructions to dissolve the preliminary injunction pending resolution of the dispute through the grievance process.

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-5674
No. 87-5702

D.C. No. CV 86-8250-HLH

UTILITY WORKERS UNION OF AMERICA,
LOCAL NO. 246, AFL-CIO;
JEANETTE CINTRON; ALAN ROOK,
Plaintiffs-Appellants,

v.

SOUTHERN CALIFORNIA EDISON COMPANY,
Defendant-Appellee.

ORDER

[Filed Oct. 18, 1988]

Before: GOODWIN, WALLACE and ALARCON, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc and no active judge called for a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV86-8250-HLH (Tx)

UTILITY WORKERS UNION OF AMERICA, LOCAL NO. 246, an unincorporated association; JEANETTE CINTRON, and ALAN ROOK,
Plaintiffs,

vs.

SOUTHERN CALIFORNIA EDISON CO., a California Corporation; DOES 1 through 100, inclusive,
Defendants.

ORDER TO SHOW CAUSE RE REMAND AND APPLICATION FOR PRELIMINARY INJUNCTION

[Filed Feb. 12, 1987]

At the hearing on January 26, 1987, the matter was continued for further briefing on the recharacterization-preemption and on the Section 301 jurisdiction issues. This Order follows the February 9 hearing.

1. *Recharacterization and Section 301 preemption.* The Court appreciates the erudite briefs filed by counsel on the preemption-recharacterization problem. The Court determines that the first two counts in the complaint must be recharacterized as LMRA causes of action under Section 301, are preempted as state law causes of action, and must be dismissed because arbitration proceedings

have not been concluded. The heart of plaintiffs' argument is that the state constitutional claims (right of privacy and right to be free from unreasonable searches and seizures) are individual claims which do not impinge upon the regulatory scheme of the NLRA and LMRA. Therefore, it is argued, that the various categories of preemption under the national labor acts (*Garmon* (359 U.S. 236, 3 L.Ed.2d 775 (1959)); *Machinists* (427 U.S. 132, 49 L.Ed.2d 396 (1976)); and Section 301) do not apply. It is argued that to enforce state law constitutional provisions potentially applicable does no harm to the collective bargaining agreement or the congressional plan of labor law management. The Court sees a fundamental difficulty with this argument. It is posited that the state constitutional rights prevent the imposition of a term and condition of employment. Application of the state constitutional rights in another setting between an employer and an employee might possibly come under one of the exceptions to preemption posited in such cases as *Linn* (1966) 383 U.S. 53, 15 L.Ed.2d 582, *Farmer* (1977) 430 U.S. 290, 51 L.Ed.2d 338, and *Garibaldi* (9th Cir. 1984) 726 F.2d 1367. However here, the essence of plaintiffs' claim is that by instituting random drug testing as a condition of employment at the San Onofre Nuclear Generating Station (hereafter SONGS), the company violated each employee's state constitutional right of privacy and to be free from unreasonable searches and seizures. What this is saying is that state law is allowed to determine what a term and condition of employment is. This, to the Court's mind, clearly comes under a category of *Garmon* preemption. Since the terms and condition of employment in this case are governed by a collective bargaining agreement, The claims come under the terms of Section 301 preemption. (*See Olguin* (9th Cir. 1984) 740 F.2d 1468, *Beers* (9th Cir. 1983) 703 F.2d 425, and *Allis-Chalmers* (1985) —— U.S. ——, 85 L.Ed.2d 206.)

The Court also notes two recent cases which have held that the assertion of state law privacy and the search and seizure arguments in the drug testing context are preempted and therefore recharacterized as federal law causes of action under Section 301. (*See Strachan vs. Union Oil Company* (5th Cir. 1985) 768 F.2d 703; *Association of Western Pulp vs. Boise Cascade* (D. Ore. 1986) 644 F. Supp. 183.)

The Court holds that causes of action one and two are recharacterizable under the *Olquin–Allis-Chalmers* holdings, and, as causes of action under Section 301 of the LMRA, state no claim because of the failure to allege exhaustion of arbitration and grievance procedures. (*Truex* (9th Cir. 1985) 784 F.2d 1347.) The first two counts are dismissed without leave to amend.

2. *NLRB Exclusive Jurisdiction.* An act alleged to be an unfair labor practice only, but not a breach of a collective bargaining agreement, is exclusively within the jurisdiction of the NLRB. (*Atchison* (9th Cir. 1975) 511 F.2d 1193.) However, where an alleged action falls into the category both of an unfair labor practice, and of a violation of a collective bargaining agreement, there is concurrent jurisdiction in the District Court and in the NLRB. (*Smith* (1962) 371 U.S. 195, 9 L.Ed.2d 246; *Motor Coach Employees* (1971) 403 U.S. 274, 29 L.Ed.2d 473; *Waggoner* (9th Cir. 1979) 607 F.2d 1229). The Court's previous tentative ruling was to dismiss the action because it then thought the contract did not cover the subject matter of drug testing, and, therefore, the allegation that the drug testing was instituted without collective bargaining was a charge of an unfair labor practice under Section 8 of the LMRA only. However, the NLRB itself has interpreted the very contract at issue in this case and has determined that the basic dispute over institution of random drug testing is, in fact, incorporated within the terms of the contract and therefore, subject to arbitration. The Court accepts the deci-

sion of the NLRB (through its general counsel) as a definitive interpretation of this labor contract.

The determination came about as follows:

In 1984, defendant instituted a drug testing program, which required drug testing at regular but not at random intervals. The union alleged that this program was instituted without prior negotiation and, therefore, alleged an unfair labor practice in a complaint filed with the NLRB. The NLRB "deferred" consideration under the NLRB standards for prearbitration deferral contained in *Collyer* (1971) 192 NLRB 837. The *Collyer* standards allow deferral for arbitration *only* if there is a collective bargaining agreement which has provisions which allow arbitration of the dispute. Thus, it necessarily follows that the NLRB considered that the collective bargaining agreement involved in this case had such provisions. The general counsel of the NLRB in affirming the deferral stated that:

> "It was concluded that the terms of the contract, including the recognition clause, the clause recognizing employees' Section 7 rights (including their right to bargain through their representatives) and the safety and management rights provisions provided a framework to all issues raised by the charge, including the alleged refusal to bargain before making unilateral changes."

It is noted that the NLRB General Counsel affirmance of the deferral decision referred not only to the provisions of Section 1 as alleged in the third count of the complaint herein, but also referred to certain other provisions of the collective bargaining agreement not mentioned in plaintiffs' complaint. Thus, there are provisions in the collective bargaining agreement allowing management to make certain "reasonable" safety rules. Thus, under the NLRB interpretation, the collective bargaining agreement itself allows the arbitrator to reach not only

the alleged refusal to bargain but the merits of the change itself as a "safety rule" or not, and, if so, whether "reasonable" or not.

The Court concludes that it has concurrent jurisdiction with the NLRB with regard to the contract issues.

3. *Nuclear Regulatory Commission Preemption.* Defendant argues that the Nuclear Regulatory Acts cause preemption of all safety-related items, so that neither the state nor federal courts, nor the NLRB, nor anyone else except the Nuclear Regulatory Commission, has jurisdiction to do anything related to safety. The Court thinks that this argument is considerably overblown. *If* the Nuclear Regulatory Commission had issued directives within its power to the Edison Company to implement a system of random drug sampling of nuclear workers, and the Edison Company had done so in accordance with the instruction of the Commission, then a genuine 18-carat solid gold preemption argument could be made. But that has not happened in this case. The Nuclear Regulatory Commission has, in fact, issued no regulations directing the Edison Company what to do. Instead, it has urged each utility maintaining nuclear plants to adopt its own program, including programs for "the fitness" of the workers to do the job. Thus, the drug program involved in this case is Edison's program, not that of the Nuclear Regulatory Commission. If it is Edison's Company's program, and if it affects a term and condition of employment, then presumptively there must be negotiations with the union, unless the collective bargaining agreement allows management to make the changes without negotiation. All of this is for the arbitrator to decide. The Nuclear Regulatory Act preemption argument is rejected. Also, without further discussion, the Court also rejects the "federal enclave" argument (not now applicable because the state law counts have been dismissed).

4. *Whether an injunction should issue.*

The Superior Court issued a temporary restraining order against the implementation of the random drug test program pending the hearing on the application for preliminary injunction. That temporary restraining order was continued, at first by stipulation and then by this court's order on January 26, to this date. The court, applying traditional standards for the issuance of a preliminary injunction, must consider whether such an injunction is necessary to maintain the status quo pending the arbitration. In short, the injunction, if issued, will be for the purpose of maintaining the status quo until the arbitrator has decided the basic question. The substantive question, whether or not the random drug testing program was properly adopted under the terms of the collective bargaining agreement, is a question for the arbitrator, not this court, at least in the first instance. Accordingly, the problem is to determine whether an injunction is necessary to hold the status quo pending the arbitrator's decision. In examining the traditional factors which go to whether a preliminary injunction should issue, the quantum of harm which will be done (a consideration sometimes going under the name of "irreparable injury" in the traditional equity jurisprudence) weighed on a sliding scale with the strengths and weaknesses of the case are to be considered. Here, the consideration must be at two levels.

First, the workers' contention that their expectations of privacy and claimed freedom from intrusive searches (not involved any longer in the embodiment of a California constitutional right, but potentially applicable to the arbitrator's consideration of the "reasonableness" of the rules if they fall under the heading of "safety rules") does not, in the Court's opinion, have sufficient urgency at this time to be considered the serious harm or irreparable injury necessary to the granting of a preliminary injunction. So far as those rights are concerned, the

harm which ought to be necessary for a preliminary injunction will not happen until someone is about to lose a job or suffer other serious injury to job rights. Even then, the availability of grievance and arbitration may obviate the necessity for a preliminary injunction, particularly if any imminent discipline involves less than discharge (for example, transfer, education, etc.). Thus, the substantive rights at issue (safety considerations, possibly, weighed against individual liberty claims) do not at this time require a preliminary injunction.

Second, the Court must consider the institutional claims of the union and employer in the context of the plan of the NLRA and LMRA and the collective bargaining agreement. The centerpiece of national labor policy is the use of collective bargaining to reach agreement between management and labor. Thus, the normal expectation in labor matters is that the parties will bargain with each other about terms and conditions of employment and reach a contract embodying agreement. The negotiating, normally, takes place before a change in terms and conditions. The parties may agree that certain areas are left to management decision and, indeed, certain areas are not required by law to be bargained about. Here, management is left by the contract with the ability to adopt "reasonable" safety rules. The union takes the position that the random drug testing rules are neither safety rules nor "reasonable. It concludes, therefore, that management had the absolute duty to bargain with the union about them before implementation. If the union is correct, a serious labor law concern is impacted going to the root of the relationship of management and labor. This preliminary injunction is sought to vindicate that basic right. On the other hand, the employer in this case has the ability to have the basic question determined almost immediately by arbitration and has declined that opportunity for what do not appear to be convincing reasons. The facts are that an arbitration over the 1984

plan for drug testing (involving regular but announced tests) was to start on February 10, 1987, the day after the preliminary injunction hearing. The union offered to stipulate that the additional element of the 1986 plan (no advance announcement, but no other substantive change) be included in the issues to be arbitrated. No reasonable reason other than tactical reasons appear to exist why that should not be done. However, the employer, apparently intent on retaining what it believed were the tactical advantages of delay, refused to agree to include the additional issue. Thus, a delay of six months to one year is likely for arbitration of the added ingredients of the 1986 plan. The Court believes that in this circumstance, the injunction should issue to prevent implementation of the 1986 plan until arbitration is had. The basic reason is to further the plan of the labor laws of this country. The union's claims are important enough to be heard seriously, whether they ultimately prevail or not. It is the process that this injunction is designed to protect, not the expectation of any particular result. The danger to the process is significant; the detriment to the employer if the matter were promptly arbitrated, as the Court thinks it should be, is minor. Accordingly, the injunction will issue. Should the union change its position about its willingness to stipulate to immediate arbitration, including inclusion in the existing arbitration, the Court will reconsider the injunction.

Bond will be set at $50,000.

IT IS SO ORDERED.

DATED: February 11, 1987.

/s/ Harry L. Hupp
HARRY L. HUPP
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 87-6150

JOHN K. LAWS, *et al.*,
Plaintiffs-Appellants,

v.

CALMAT,
Defendant-Appellee.

Argued Feb. 4, 1988.

Submitted May 4, 1988.

Decided July 12, 1988.

Appeal from the United States District Court
for the Central District of California

Before ALARCON, FERGUSON and BEEZER, Circuit Judges.

FERGUSON, Circuit Judge:

John K. Laws ("Laws") appeals the district court's denial of his motion to remand to state court the lawsuit he initiated against his employer, Calmat Corporation ("Calmat"). In addition, he appeals the district court's grant of summary judgment to Calmat. Laws argues

that his right to privacy under the California State Constitution was violated by Calmat's mandatory drug testing program. Laws argues that reversal is required because the district court erroneously found that his state law claim is preempted by section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, section 3102 of the Motor Carrier Safety Act ("MCSA"), 49 U.S.C. § 3102, and the United States Department of Transportation Regulations ("DOT regulations") promulgated under the authority of the MCSA. We affirm the district court.

I.

Laws, a member of the Chauffeurs, Teamsters and Helpers Union Local No. 186 ("Union"), is employed by Calmat as a "concrete mixer-driver." Calmat operates a building products and production facility in Oxnard, California. The Union and Calmat are parties to a collective bargaining agreement ("CBA") governing the terms and conditions of employment for Calmat drivers, including Laws.

On October 1, 1986, Calmat unilaterally implemented a "Drug and Alcohol Policy" which requires, *inter alia*, urinalysis testing of all current and prospective driver and non-driver employees (1) at all physical examinations required by Calmat and (2) at the discretion of a supervisor whenever any employee is involved in a work-related accident or injury, or when the physical condition of an employee is "in doubt." Employees are expected to consent to testing "as a condition of continuing employment." Refusal to be tested results in immediate suspension of the employee. A positive test will result in disciplinary action up to and including discharge.

On April 2, 1987, Laws went to a Calmat physician for a physical examination in connection with renewal of his Class II driver's license. Class II licenses are subject to federal regulation by the MCSA. DOT regulations require a physical examination, including urinalysis, for

renewal of a Class II license. 49 C.F.R. 391.41-391.49. Laws declined to submit to a urine test at his Calmat physical and was suspended without pay for thirty days. He was informed by Calmat that a second refusal would result in his termination. Laws claims that his private doctor performed a urinalysis examination and that the result was negative. Apparently, Laws took a urinalysis test on April 28, 1987, was medically certified for his Class II driver's license, and returned to work on May 1, 1987.

Laws did not attempt to grieve his dispute concerning his suspension or Calmat's drug and alcohol policy. There is in fact no indication that he ever contacted the Union regarding the drug testing requirement or his own case. Instead, on April 22, 1987, Laws filed a class action suit in state court on behalf of himself and all Calmat employees. Laws sought to enjoin Calmat's testing program on the grounds that the policy of testing all employees—regardless of whether or not they were suspected of drug or alcohol abuse—was in violation of Laws' and all Calmat employees' right to privacy as set forth in Article I, Section 1 of the California State Constitution. Laws did not pray for damages resulting from his suspension but only sought declaratory and injunctive relief.

On April 27, 1987, Calmat removed this action to federal court on grounds of federal question subject matter jurisdiction. The district court concluded that it had jurisdiction pursuant to section 301 of the LMRA, 29 U.S.C. § 185, section 3102 of the MCSA, 49 U.S.C. § 3102, and the DOT regulations promulgated under the authority of the MCSA. The district court then granted summary judgment for Calmat on the grounds that, pursuant to section 301 of the LMRA, Laws' proper remedy was through the grievance and arbitration provisions in the CBA. Moreover, the court found that Laws' state law claim conflicted with the DOT regulations and, therefore, failed under the Supremacy Clause of the United States

Constitution. No findings were made regarding sections 7 and 8 of the National Labor Relations Act ("NLRA").[1] Laws timely appealed. This court has jurisdiction under 28 U.S.C. § 1291. We review de novo both the denial of a motion to remand an action to state court for lack of removal jurisdiction and the grant of a motion for summary judgment. *Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993, 996 (1987).

II.

Laws argues that the district court erred in finding that his state cause of action was removable pursuant to section 301 of the LMRA. He asserts that his claim is wholly independent from the CBA between the Union and Calmat and, therefore, does not implicate section 301. Thus, he argues, remand is proper. This circuit recently considered and rejected a similar argument in *Utility Workers of America v. So. Cal. Edison Co.*, 852 F.2d 1083 (9th Cir. 1988).

In *Utility Workers*, Southern California Edison ("SEC") implemented a random employee drug testing program without first negotiating with Local 246, the collective bargaining agent for represented employees. Two plant employees and Local 246 filed an action in state court alleging that SCE's drug testing program violated their California state constitutional rights to privacy and freedom from unreasonable searches and seizures. *Id.* at 1085. SCE removed the case to federal court where the state claims were dismissed as preempted by section 301. *Id.* at 1085. On appeal, this court af-

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[1] Section 7 identifies protected or arguably protected employee activity, 29 U.S.C. § 157, and section 8 enumerates certain "unfair labor practices" which are illegal if engaged in by management, § 8(a), or labor, § 8(b), 29 U.S.C. § 158. The question of whether the National Labor Relations Board ("NLRB") has exclusive jurisdiction over this dispute is raised by both parties on appeal.

firmed the district court's dismissal of Local 246's state constitutional claims. *Id.* at 1088.

This court first repeated the now familiar proposition that the preemptive effect of section 301 of the LMRA [2] is so powerful that for the purposes of the well-pleaded complaint rule it will transform state claims into federal ones. *Id.* at 1085.[3] Thus, if an employee attempts to escape application of section 301 by alleging only state law violations—when in fact the claims implicate the CBA—the employee will be subject to the artful pleading doctrine, which "requires that the state law complaint be recharacterized as one arising under the collective bargaining agreement. The case may then be removed to federal court and adjudicated under the appropriate federal law." *Olguin v. Inspiration Consol. Copper Co.*, 740 F.2d 1468, 1472 (9th Cir. 1984). In this way, an employee subject to a CBA will not be able to avoid the application of federal laws by filing only state claims.

In *Utility Workers*, we applied the following test for determining whether to uphold federal preemption of state claims:

> [W]hen resolution of a state-law claim is *substantially depedent upon* analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim . . . or dismissed as pre-empted by federal labor-contract law.

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[2] Section 301 provides in pertinent part: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties. . . ." 29 U.S.C. § 185.

[3] This complete preemption reflects the goals of national labor laws, which were enacted to avoid the application of inconsistent state laws and thus ensure the integrity of both the collective bargaining process—and any agreement the process produces. *See e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985).

Utility Workers, at 1086 (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220, 105 S.Ct. 1904, 1916, 85 L.Ed.2d 206 (1985)) (emphasis added). We concluded that Local 246's constitutional claims were "substantially dependent" upon analysis of the CBA. Specifically, we noted the articles in the CBA which recognized SCE's right to manage the plant, direct the work force and implement safety rules. *Utility Workers*, at 1086. Because the union's state constitutional claims could not be resolved without considering the CBA we affirmed the district court's dismissal of those claims. *Id.* at 1087.

Applying the test to the present case, we must hold that Laws' claim is also "substantially dependent upon" the Calmat-Union CBA. Laws' conditions of employment are governed by the CBA. A drug and alcohol testing program, upon which all employees' continued employment depends, is a working condition whether or not it is specifically discussed in the CBA. Moreover, Laws' state law claim arises out of his suspension and threatened discharge. Calmat stated the reason for Laws' suspension as "insubordination" for refusing to take the urinalysis test. Under Article IX, Section 1 of the CBA, "[a]n employee may be discharged or disciplined for . . . insubordination" and may protest through the grievance and arbitration procedures any punishment considered unjustified. In addition, Calmat and the Union have previously agreed and included in the CBA that "intoxication" due to drugs or alcohol is grounds for "discharge or disciplinary layoff." Although the manner of discovering employee intoxication is not in the current CBA, the reference to "intoxication" seems to identify this arena as a subject for the collective bargaining process—not the courts. Thus, Laws' alleged state claim should be treated as an "artfully pled" section 301 claim.[4] *See Utility Workers*, at 1087.

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[4] We also reject Laws' argument that his Union cannot bargain away his right to be free from mandatory drug testing. In *Utility*

Contrary to Laws' assertion, *Caterpillar Inc. v. Williams*, —— U.S. ——, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987), does not require a different result. Laws cites the following language to support his position:

> Section 301 does not . . . require that all "employment-related matters involving unionized employees" be resolved through collective bargaining and thus be governed by . . . § 301. . . . Claims bearing no relationship to a collective-bargaining agreement beyond the fact that they are asserted by an individual covered by such an agreement are simply not preempted by § 301.

Id. 107 S. Ct. at 2432 n.10. Laws further notes that the Court wrote:

> When a plaintiff invokes a right created by a collective-bargaining agreement, the plaintiff has *chosen* to plead what we have held must be regarded as a federal claim, and removal is at the defendants option. But a *defendant* cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated.

Id. at 2433 (emphasis in original). Laws concludes that, like the plaintiff in *Caterpillar*, he "chose" not to assert any claims he might have had under the CBA and Calmat cannot "inject" a federal question into the action to justify removal.

Such reliance is misplaced. In *Caterpillar*, union-represented employees brought an action in state court

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Workers we wrote that "[d]rug testing does not implicate the sort of 'nonnegotiable state-law rights' that preclude preemption under section 301. . . . The question of drug testing obviously implicates important personal rights. To the best of our knowledge, however, no court has held that the right to be free from drug testing is one that cannot be negotiated away, and we decline to make such a ruling here." At 1086 (citations and footnote omitted).

against their former employer for breach of individual employment contracts. The employees alleged that when they were in non-union management positions—prior to representation by a union—Caterpillar made oral and written promises of their continued employment in the event of a plant closure. Subsequently, Caterpillar downgraded the employees to positions covered by a CBA. The employees asserted that Caterpillar assured them the downgrades were only temporary. When the plant closed and the employees had been notified they had been laid off, they brought suit in California state court to challenge breaches of the contracts formed by Caterpillar's promises made to the employees when they did not belong to a union.

Caterpillar then removed the case to district court based upon section 301 preemption. After the district court dismissed the action, we reversed. The Supreme Court affirmed our decision, holding that although the employees belonged to a union at the time the plant closed and *could* have asserted rights under the CBA, the employees' allegations arose from breach of "*individual* employment contracts with them." *Id.* at 2431 (emphasis in original). Their rights under these individual contracts, therefore, were wholly separate from any rights derived from a CBA.

Unlike the employees in *Caterpillar*, Laws was a union-represented employee at all times relevant to his claim. Moreover, as discussed above, his complaint arises from dissatisfaction with a working condition and disciplinary measures taken when he refused to conform to that condition. Thus, his "rights" are not wholly separate from the CBA, but are inextricably intertwined with it.[5] *See*

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[5] Our holding is consistent with the Supreme Court's recent decision in *Lingle v. Norge Division of Magic Chef, Inc.*, —— U.S. ——, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988). Although the Court reaffirmed the proposition that the NLRA will preempt state law claims requiring interpretation of a CBA, it added that § 301 "says

Allis-Chalmers, 471 U.S. at 213, 105 S.Ct. at 1912. The district court therefore correctly determined that Laws' state cause of action implicated his CBA and could be removed to federal court.[6]

CONCLUSION

Removal of Laws' lawsuit based on complete preemption by section 301 of the LMRA was proper. Since Laws failed to exhaust his administrative remedies as established in the CBA, we affirm the district court.

AFFIRMED.

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nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements." *Id.* at ——, 108 S.Ct. at 1883. The employee's cause of action in *Lingle* alleged violation of a well-established and recognized tort provided to workers under Illinois laws. *Id.* at ————, 108 S.Ct. at 1881-82. Not only had the state courts interpreted the state's Workers' Compensation Act to apply to employees who are parties to a CBA, the Illinois courts also set forth the specific factual questions for review of such claims. *Id.* The California courts have not applied in a published opinion the California constitutional right of privacy in a drug-testing context. Thus Laws' claim is not an established or recognized state law claim. Moreover, in the instant case, we believe Laws' claim is inextricably intertwined with his CBA. *See id.* at ——, 108 S.Ct. at 1884 ("judges can determine questions of state law involving labor-management relations only if such questions do not require construing collective-bargaining agreements").

[6] The district court declared Laws' action preempted under the DOT regulations as well as section 301 of the LMRA. We do not address Laws' argument regarding the supremacy of the DOT regulation since its resolution would not change the result that Laws' claim was properly removed under section 301.

Moreover, we do not address the issue of whether the NLRB has exclusive jurisdiction of Laws' complaint such that his state court jurisdiction must be displaced. Because Laws did not exhaust available administrative procedures, we cannot consider the NLRB question "even if [the federal district court] shares jurisdiction with the NLRB." *Utility Workers*, 1088.

Supreme Court, U.S.
FILED
FEB 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1180

In the
Supreme Court of the United States
October Term, 1988

UTILITY WORKERS UNION OF AMERICA, AFL-CIO, LOCAL NO. 246, and ALAN ROOK,

Petitioners,

v.

SOUTHERN CALIFORNIA EDISON COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Charles R. Kocher
John W. Evans
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QUESTIONS PRESENTED

1. Whether state law claims for invasion of privacy of union employees working at a nuclear generating station are preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, when:

   (a) the collective bargaining agreement recognizes the employer's right to manage the nuclear power plant, to direct the working force and to implement reasonable safety rules and require their observance; and

   (b) the claims challenge the propriety of a drug screen urinalysis implemented as a term and condition of employment by the employer under its contractual authority to manage the facility and implement safety and work rules; and

   (c) the union has filed a grievance over the implementation of the drug screen.

2. Whether the Ninth Circuit's decision is in conflict with the Sixth Circuit's decision in *Smolarek v. Chrysler Corp.*, 858 F.2d 1165 (6th Cir. 1988).

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

No. 88-1180

UTILITY WORKERS UNION OF AMERICA,
AFL-CIO, LOCAL NO. 246, and ALAN ROOK,
Petitioners

v.

SOUTHERN CALIFORNIA EDISON COMPANY,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Defendant-Respondent Southern California Edison Compan ("SCE") opposes the petition for writ of *certiorari* filed by Plaintiff Petitioners Utility Workers Union of America, AFL-CIO, Loca No. 246, and Alan Rook (collectively referred to herein as "Loca 246"). No significant legal issue is presented by the petition an Local 246 misapprehends governing case authority of this Cou and the circuit courts.

JURISDICTION

Jurisdiction is based on 28 U.S.C. § 1254(1) for review b writ of *certiorari*. Jurisdiction below was invoked pursuant Section 301 of the Labor Management Relations Act, 29 U.S.C. 185 ("Section 301") and 28 U.S.C. § 1441.

STATEMENT OF THE CASE

In its petition, Local 246 sets forth a "Statement of the Cas which purports to relate the facts and procedural history of th

instant matter. SCE respectfully submits the following statement of the case, which describes the seminal history of this dispute and corrects several significant inaccuracies in the petition.

As the operator of the San Onofre Nuclear Generating Station ("SONGS"), SCE has implemented several personnel screening devices for controlling access to the "Protected Area" at the station, a security area encompassing the nuclear reactors and to which access is strictly governed. No worker is permitted unescorted access to the Protected Area until a comprehensive background investigation and psychological evaluation have been completed. Additionally, all individuals — including those represented by Local 246 — are searched upon entry into the Protected Area.

In September 1984 a drug screen urinalysis was put into effect without prior negotiations with Local 246, which thereafter filed a grievance asserting that the implementation of the drug screen was not authorized by the applicable Collective Bargaining Agreement between Local 246 and SCE. In addition, Local 246 filed a charge with the National Labor Relations Board ("NLRB") alleging that SCE's unilateral implementation of the drug screen program was an unfair labor practice in violation of Section 8(a)(1) and 8(a)(5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 158(a)(1) and 158(a)(5). The NLRB deferred the charge to arbitration and Local 246 did not pursue the matter or otherwise challenge SCE's actions in court. (App.3a-4a.)[1]

Approximately two years after this drug screen was first implemented, SCE made certain changes in its administration, including modification of the test schedule so that the nuclear workers would not know the annual test date well in advance. On December 8, 1986, Local 246 filed a grievance asserting that this modification violated the Collective Bargaining Agreement. (App.4a.)

Despite the fact that it had grieved the implementation of the modified drug screen, Local 246 filed this action in state court on December 10, 1986, alleging a breach of contract under Section 301 as well as violations of the California Constitution, Article 1, Sections 1 and 13, which confer a right of privacy and freedom from unreasonable search and seizure. The state court

[1] "App.3a-4a" refers to pages 3a-4a of the appendix to the petition. Similar references are used throughout this brief.

issued a temporary restraining order on that date. SCE remove the case to federal court. (App.4a.) After the parties submitte several briefs on the issues of pendent and subject matt jurisdiction, the district court issued an order dismissing the fir three causes of action of the underlying complaint on the groun that the state law claims asserted therein were preempted b federal law. Because Local 246 had not exhausted the grievan and arbitration procedures, the state law causes of action we not cognizable under Section 301. (App.14a-15a.)

The district court found that it had concurrent jurisdictio with the NLRB over the remaining Section 301 cause of actio and issued a preliminary injunction in aid of arbitration despite the concomitant findings that Local 246 would not suff irreparable harm if the drug screen were implemented and th the parties' Collective Bargaining Agreement provided th grievances be arbitrated in chronological order. (App.17a-20a.

After the district court certified the order dismissing t state law claims pursuant to Rule 54 of the Federal Rules of Civ Procedure, both parties filed appeals to the rulings adverse them. The Ninth Circuit determined that Local 246's state la privacy claims were substantially dependent upon analysis the Collective Bargaining Agreement and constituted a prop negotiable subject for collective bargaining. (App.6a.) The cou specifically noted that resolution of the claimed state la violations rests upon Articles VI and X.N of the Collecti Bargaining Agreement, which recognizes SCE's right to mana the plant, to direct the working force and to implement a enforce reasonable safety rules. In light of the fact that resoluti of Local 246's claims required reference to and reliance on t Collective Bargaining Agreement, the Ninth Circuit upheld t dismissal of the state constitutional law claims.[2] (App.6a-8a.) T Ninth Circuit denied Local 246's request for rehearing *en ba* (App.12a.)

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[2] The Ninth Circuit also held that the district court should have dismissed Section 301 claim itself in light of Local 246's failure to comply with availa grievance procedures. It also concluded that the district court erred in issu a preliminary injunction against implementation of the drug testing progr pending arbitration. Local 246 contests neither of these holdings by Ninth Circuit. (Petition at 3-4 n.2.)

SUMMARY OF ARGUMENT

This case presents no issue which would warrant granting the petition for writ of *certiorari*. Local 246's assertion that the Ninth Circuit departs from this Court's rulings in *Caterpillar Inc. v. Williams*, 482 U.S. 386, 107 S.Ct. 2425 (1987), and *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. ____, 108 S.Ct. 1877 (1988), is based on a fundamental misreading of those cases. In addition, Local 246's argument that the Ninth and Sixth Circuits are in conflict is wrong: the Sixth Circuit case cited by Local 246 is in total harmony with relevant Ninth Circuit authority. The Ninth Circuit's ruling in this case was based on long-standing and unequivocal case authority, including this Court's rulings. It was soundly reasoned, is in accord with analogous cases from other circuits and provides no basis for scrutiny by this Court.

REASONS FOR DENYING THE PETITION

Supreme Court Rule 17 sets forth a detailed list of reasons for granting review on writ of *certiorari* and also states that review is granted "only when there are special and important reasons therefor." None of the reasons for granting review enumerated by Local 246 obtains in this case, nor are there any other "special and important reasons" for granting review on writ of *certiorari*.

First, Local 246 has persisted in both misplaced reliance on *Caterpillar Inc. v. Williams*, 482 U.S. 386, 107 S.Ct. 2425 (1987), and a fundamental misreading of the case. *Caterpillar* sets forth the standard for *removal* under Section 301, and the propriety of removal is not and has never been at issue in this case.[3] Local 246's discussion of the "complete preemption" doctrine and "defensive" preemption is immaterial to the instant dispute.

Contrary to Local 246's assertion, neither the Ninth Circuit nor the Supreme Court in *Caterpillar* reached the issue of whether the state law claims asserted in that case were preempted by

[3] As Local 246 concedes in its petition, the underlying complaint contained a cause of action for breach of the Collective Bargaining Agreement under Section 301; thus, removal was appropriate on the face of the complaint irrespective of the nature of the state law claims. (Petition at 3-4.)

federal labor law. Both courts held simply that removal w improper because on the face of the complaint the claims we grounded in state, not federal law, and did not constitute "artful pleaded" Section 301 claims. The substantive preemption questi was expressly reserved by both the Ninth Circuit (786 F.2d 92 937 (9th Cir. 1986)) and the Supreme Court on review (482 U. at ____ n.13, 107 S.Ct. at 2433 n. 13). *Caterpillar* itself, then, mak clear that the merits of the preemption issue, *i.e.*, whether sta claims are extinguished by federal law, is an issue distinct fro the issue of the jurisdictional basis of their removal to feder court. *See also Price v. PSA, Inc.*, 829 F.2d 871 (9th Cir. 1987), *ce denied*, 108 S.Ct. 1732 (1988).

Local 246 asserts that like the plaintiffs in *Caterpillar*, "chose" not to rely on the applicable Collective Bargainir Agreement but on state law. (Petition at 4-5.)[4] *Caterpillar* is whol distinguishable. In that case, the plaintiffs alleged breach individual employment agreements made when plaintiffs we non-union employees, outside the aegis of the bargainir agreement. For purposes of removal, this Court determined th the state law claims were neither grounded in the agreeme nor substantially dependent on analysis of the agreement f their resolution. Critical to this Court's decision was the fact th the claims raised did not address or require any interpretati of the relationship between the alleged individual contracts ar the collective bargaining agreement. 482 U.S. at ____, 107 S.C at 2431. The labor agreement in that case would come into pl only in defense of the state law wrongful discharge claims. at ____, 107 S.Ct. at 2432.[5] Here, of course, as the district cou and the Ninth Circuit correctly found, SCE's right to impleme and later modify a drug testing program is mandated by t Collective Bargaining Agreement itself and resolution of t state law claims necessarily requires consideration of the Colle tive Bargaining Agreement.

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[4] Local 246's assertion is not accurate. Local 246 did choose to rely on Collective Bargaining Agreement when it fashioned its state court complai It sued SCE for breach of contract (the Collective Bargaining Agreeme and sought an injunction pending arbitration under the Collective Bargaini Agreement.

[5] Again, this Court in *Caterpillar* neither decided the substantive preempti issue nor did it suggest that all allegations of preemption under Section are "defensive" as Local 246 seems to suggest. *See Allis-Chalmers Corp. v Lue* 471 U.S. 202 (1985).

Although Local 246 has labeled the claims "constitutional" violations, the challenge is to the conduct of SCE undertaken under the authority of the parties' Collective Bargaining Agreement. Article X.N. of that Agreement requires SCE to provide for the safety of its employees and grants to SCE the right to promulgate and enforce "reasonable" safety rules. Additionally, Article VI, the management rights clause, reserves to SCE the broad right to manage and direct the plant and its employees. (App.6a.) If Local 246 objects to SCE's exercise of its rights under these or any other provisions of the Collective Bargaining Agreement, this claim may be pursued through the grievance procedure to binding arbitration by virtue of Articles IV and V.

Such a challenge may ultimately resolve whether an action undertaken by SCE — such as the modification of its drug testing program at SONGS — is an unreasonable exercise of management discretion, an unreasonable safety or work rule or an unreasonable intrusion upon its employees. In recognition that the grievance/arbitration procedure provides the appropriate forum for resolving such employer/employee issues, Local 246 filed a grievance protesting the initial drug test requirement and is pursuing it through arbitration. A grievance was also filed under the grievance/arbitration provisions of the Collective Bargaining Agreement in connection with the December 1986 modification at issue here.

Thus, even Local 246 recognizes that SCE's claim of right derives from the Collective Bargaining Agreement and any challenge to that right is governed by that Agreement. Accordingly, as the district court and Ninth Circuit determined, Local 246's state law "constitutional" claims are preempted by Section 301, a ruling totally compatible with this Court's opinion in *Caterpillar*.

Similarly, The Ninth Circuit opinion does not conflict with this Court's ruling in *Lingle*. In *Lingle*, in fact, this Court reaffirmed that Section 301 jurisdiction obtains where plaintiffs' claims can be resolved only by reference to the terms of a collective bargaining agreement. In that case, which involved a claim of retaliatory discharge based on the state workers' compensation statute, no reference to the parties' bargaining agreement was necessary. Illinois law provided that protection from retaliatory discharge is non-negotiable and applies to both union and non-union employees. Well established pertinent principles of Illinois

law would not require a court to construe the collective bargaining agreement. 486 U.S. at ____, 108 S.Ct. at 1882-83.

In this case, however, both the claim that drug testing violates union employees' right to privacy and the claim that such testing is an unconstitutional search and seizure necessarily depend for their resolution on an analysis of the Collective Bargaining Agreement. As Local 246 itself concedes, state law privacy rights are not absolute. (Petition at 4.) Such claims have at their core the individual's right to be free of objectively unreasonable searches or intrusions. *See* RESTATEMENT (SECOND) OF TORTS § 652B (1977); *People ex rel. Franchise Tax Board v. Superior Court*, 164 Cal. App.3d 526, 540-41, 210 Cal. Rptr. 695, 703-04 (1985) (basic test of whether California's constitutional right of privacy has been violated "is whether a person's personal and objectively reasonable expectation of privacy has been infringed by unreasonable governmental intrusion"). Regardless of the state law label attached to the claims, the reasonableness of SCE's drug test program at SONGS and the privacy expectations of its employees are a function of Articles VI and X of the Agreement which recognize SCE's right to manage the plant, direct the working forces, and implement reasonable safety requirements. Employee privacy at SCE is not independent of the Collective Bargaining Agreement but, instead, is defined by it.

Privacy rights do not exist in a vacuum nor are they devoid of variance. It is clear that the "reasonableness" of both the expectation of privacy and the intrusion depends on the circumstances. There is no "fixed" standard. Even if a state privacy right itself could not be "waived," the expectation of privacy may certainly be altered. Under federal constitutional provisions similar to the ones relied on by Local 246, the highly regulated character of an industry and the nature of the work place may affect the expectation of privacy by an employee and the justification for the intrusion. *See, e.g., Rushton v. Nebraska Public Power District*, 844 F.2d 562 (8th Cir. 1988) (random drug testing of employees at publicly-owned nuclear power plant upheld); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986) (random drug testing of horse racing jockeys upheld) and *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987) (random urine screens of prison correctional officers upheld). Thus, the extent of a "right to privacy" in the workplace is dependent on the circumstances of employment.

One of the obvious "circumstances" of employment here extant is that there is a Collective Bargaining Agreement,

negotiated with an employer engaged in a highly regulated and safety-conscious industry which, by virtue of the safety and management rights clauses, may delimit an employee's *expectation* of privacy. It is clear that objective "reasonableness" is at the core of incursions on an employee's privacy, and that the determination of "reasonableness" is properly a function embraced in the Collective Bargaining Agreement. Particularly where, as here, an employer has the right to impose reasonable safety or work rules, the reasonableness of such requirements must be tested by the grievance and arbitration provisions contained in the Collective Bargaining Agreement. *See Strachan v. Union Oil Co.*, 768 F.2d 703 (5th Cir. 1985); *Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253 (4th Cir. 1987); *Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111 (1st Cir. 1988), discussed *infra*. As noted, Local 246 clearly recognizes this maxim of labor law; it has filed a grievance alleging that the drug screen violates the Collective Bargaining Agreement. Thus, it was entirely proper for the district court and Ninth Circuit to find that the state law privacy claims were preempted by and governed by Section 301.

Local 246's preoccupation with the issue of "waiver" is prompted by misplaced reliance on dicta in *Lingle*. In footnote 9, the Court refused to decide whether a union could waive non-preempted state law rights (such as protection from retaliation for filing a workers compensation claim in that case) but noted that such waiver would require clear evidence of an intent to waive those rights. 486 U.S. at ____ n.9, 108 S.Ct. at 1882 n.9. As noted, however, the *Lingle* case involved non-negotiable, state law rights which did not depend on a collective bargaining agreement for their enforcement, *i.e.*, as it clearly stated in footnote 9, the Court was addressing waiver of *non-preempted* state law rights. As to claims such as the state law privacy claims in this case, which, because of the very nature of the claims, depend for their resolution on the contents and interpretation of a collective bargaining agreement, the claims are preempted and the footnote is irrelevant. It is one thing to possess an absolute right to bring a lawsuit in retaliation for filing a workers compensation claim, which the state courts have determined to be non-negotiable (the case in *Lingle*) and quite another to possess a right such as the privacy protection claimed herein, which, as Local 246 concedes, is *not* absolute and the nature and scope of which depend substantially on the parties' Collective Bargaining Agreement.

Local 246 has simply missed the thrust of the *Lingle* case. This Court reaffirmed that its decision "should make clear that interpretation of collective bargaining agreements remains firmly in the arbitral realm; judges can determine questions of state law involving labor-management relations only if such questions do not require construing collective bargaining agreements." *Id.* at at ____, 108 S. Ct. at 1884. *See also Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985); *International Brotherhood of Electrical Workers v. Hechler*, 481 U.S. 851 (1987).

Finally, there is no conflict among the Circuit courts. Local 246's attempt to create such a conflict based on *Smolarek v. Chrysler Corp.*, 858 F.2d 1165 (6th Cir. 1988) is unavailing. In its own brief, in fact, Local 246 notes that the Ninth Circuit has concurred with the *Smolarek* holding that a union employee's claims based on state anti-discrimination statutes are not pre-empted by Section 301. (Petition at 20-21 n.13). The instant case has nothing whatsoever to do with state anti-discrimination laws.

Local 246 also fails to point out to this Court that the Ninth Circuit's ruling is in total *harmony* with analogous cases from the Fourth and Fifth Circuits and, most recently, the First Circuit. In *Strachan v. Union Oil Co.*, 768 F.2d 703 (5th Cir. 1985), two union employees suspected of on-duty drug use were suspended and later reinstated after drug tests proved negative. Both filed grievances over the company's action and, in addition, filed a court action alleging state tort claims which, like Local 246's claim herein, included invasion of privacy. One of the employees claimed that he was forced to submit to searches of his person (blood and urine testing), his automobile and his locker. *Id.* at 705. The Fifth Circuit rejected the notion that the invasion of privacy claim was a claim independent of the collective bargaining agreement:

> These various claims by the appellants demonstrate clearly an attempt to create major state court claims out of matters which are all part of a company claim of right under a collective bargaining agreement, and the employee's right to challenge such claims through grievance procedure ending in binding arbitration. *Id.*

The Fifth Circuit determined that Section 301 preempted the invasion of privacy claims and stated that if the plaintiffs wanted to challenge the drug testing program, the "obvious remedy" was to refuse the searches and file a grievance if disciplinary action was taken, and thereby test the reasonableness of the

searches. To hold otherwise would destroy "the critically important aspect of collective bargaining which is involved in the establishment of the grievance procedure to protest breaches of labor contracts. . . ." *Id. Accord, Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253 (4th Cir. 1987) (state law privacy claim based on employer's requirement that employee suspected of illegal drug use undergo search of person and automobile was preempted by Section 301); *Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111 (1st Cir. 1988) (since resolution of union employee's claim for invasion of privacy under state law following the failure of an employer-ordered drug test could not be made without interpreting a collective bargaining agreement claim was preempted under Section 301); *Association of Western Pulp and Paper Workers v. Boise Cascade Corp.*, 644 F.Supp. 183 (D. Or. 1986) (claim alleging that an employer's alcohol and drug testing program violated employees' common law right of privacy preempted by Section 301). Thus, no conflict exits among the Circuit courts.

CONCLUSION

Local 246 has raised no "special and important" reason in its petition to justify granting review of the Ninth Circuit's decision in this case. Accordingly, the petition should be denied.

Dated: February 16, 1989.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 1 1989
JOSEPH F. SPANIOL, JR.
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No. 88-1180

IN THE

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OCTOBER TERM, 1988

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v.

ERN CALIFORNIA EDISON COMPANY,
Respondent.

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etition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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OCTOBER TE

No. 88-1

UTILITY WORKERS U
AFL-CIO, LOCAL NO. 2

v.

SOUTHERN CALIFORNIA

On Petition for a Writ
United States Co
for the Ninth

PETITIONERS' REPL

By rewriting both the Ninth Court's decisions, respondent Company ("SCE") seeks to the Ninth Circuit's decision i trary to this Court's decisions *liams*, 482 U.S. 386, 107 S. C *v. Norge Division of Magic* 108 S. Ct. 1877 (1988).[1] S

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[1] SCE also rewrites the petitione defense thereto. The petitioners di rely on the Collective Bargaining A [their] . . . complaint." Brief in Op *discrete* claims under the Californi

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pinion and this
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87), and *Lingle*
486 U.S. ——,
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alleging violation

collective bargaining agreement were intend
SCE from compliance with the privacy prov
California Constitution.

Concomitantly, the Ninth Circuit did n
suggests, consider the parameters of the
tection as a matter of state law and concl
state law cause of action turns on the prov
collective bargaining agreement.[3] To the
Ninth Circuit did not consider *at all* the n
state cause of action, or distinguish a s
cause of action from any other state cau
Instead, the Ninth Circuit held, *broadly*
ally, that where the employer simply *asse*
union "has *bargained away* its members'
stitutional rights" (Pet. for *Cert.*, App. A
phasis supplied), that assertion alone is
divest the court of the authority to consid
claimed state right. *See also id.* ("no co
that the right to be free from drug testin
cannot be negotiated away . . . .").

Implicitly recognizing this flaw in the N
holding, SCE also attempts to recast the N
characterization of its own defense. SCE n
an essential element of the petitioners'
existence of a reasonable expectation of
that a determination as to the reasonabl
such expectation necessarily entails exami
terms of the collective bargaining agreem
Opp. at 7-8. But, despite SCE's protest
contrary, the Ninth Circuit viewed the
as one of waiver, characterizing the iss
whether the petitioner union "has bargai
members' claimed constitutional rights." T
cuit made no inquiry at all into the natur

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[3] We note that while the state privacy protect
solute," no state court has suggested that the natur
tion turns in any way upon the terms of a colle
agreement, nor has the union in this case so conced

ment if and when that agreement becomes relevant as a *defense* to petitioners' state cause of action, but that by simply raising that defense, the employer can preclude the plaintiffs from litigating their state cause of action before any forum, state or federal. In other words, SCE argues that petitioners' cause of action is *completely* preempted, under the principles announced in *Allis-Chalmers* and *Hechler* and further explicated in *Caterpillar*. As to that argument, *Caterpillar* is in fact controlling.

In addition to LMRA § 301 complete preemption, the employer asserted, and the Court in *Caterpillar* addressed, two forms of NLRA preemption: (1) preemption of state law that "upsets the balance of power between labor and management expressed in our national labor policy[,]" *citing Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 146, 96 S. Ct. 2548, 2556 (1976); and (2) preemption of state law that infringes upon the NLRB's primary jurisdiction over unfair labor practice charges, *citing San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S. Ct. 773 (1959). *Caterpillar*, 107 S. Ct. at 2432. As to these NLRA preemption issues, not the LMRA § 301 preemption question involved here, the Court held that "[t]he fact that a defendant might ultimately prove that a plaintiff's claims are preempted under the NLRA does not establish that they are removable to federal court." 107 S. Ct. at 2432. The Court also noted that the merits of *those* preemption questions should be "addressed in the first instance by the state courts in which [the plaintiffs] filed their claims. 107 S. Ct. at 2433 n.13.

The employer in *Caterpillar* also argued, as a *defense* to the state cause of action asserted, that the collective bargaining agreement waived any state law rights the employees may have had. That waiver argument has a precise parallel in this case, despite SCE's protestations to the contrary. *See* pp. 3-4, *supra*. But the Court held that while such a waiver defense may indeed raise a

eck, and since the waiver defense is the only basis Ninth Circuit asserted for finding preemption, this of action is as non-preempted as the one in *Lingle*.

As to the existence of a conflict between the Sixth Ninth Circuits, SCE apparently argues that the ce of a conflict depends solely upon whether the n line result reached by the Circuits is the *same* in *cal* cases, rather than whether the Circuits have ed inconsistent rationale that will lead inevitably *posite* results in *similar* cases. It is true that both xth and Ninth Circuits have reached the same bot- ine result regarding preemption of state anti-dis- nation claims. *Compare Smolarek v. Chrysler Corp.*, .2d 1165 (6th Cir. 1988) *with Miller v. AT & T rk Systems*, 850 F.2d 543 (9th Cir. 1988) *and man v. Western Electric Co., Inc.*, 860 F.2d 1514 Cir. 1988). But the Ninth Circuit's *rationale* here odds with the Sixth Circuit's *rationale* in *Smolarek*. Sixth Circuit plaintiff employees will be permitted gate their state law claims even where the employer s a defense of right under the collective bargaining ment. 858 F.2d at 1170. But in the Ninth Circuit, correction from this Court, where the employer ds by invoking the terms of the collective bargain- greement, plaintiff employees will be permitted to e only those state law claims that are already "well- ished" and "recognized" through "published opin- of the state's courts. Pet. for *Cert.*, App. D at 5.[5]

eed, this requirement of documented judicial lineage crux of the Ninth Circuit's holding here. Rather

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s holding is taken from footnote 5 of the Ninth Circuit's in *Laws v. CALMAT*, 852 F.2d 430 (9th Cir. 1988). Foot- of *Laws* was incorporated by reference into the Ninth Cir- pinion below as the circuit court's sole reference to and treat- f the Court's recent opinion in *Lingle*. Pet. for *Cert.*, App. 1a.

than apply this Court's rationale in *Lingle* respecting the right of states to provide substantive protections to workers which do not depend for their existence upon the interpretation of a collective bargaining agreement, 108 S. Ct. at 1884-85, the Ninth Circuit engaged in sophistry by distinguishing *Lingle* on the basis of the non-dispositive historical fact that there the plaintiff's substantive state law claim was neither novel nor untested.[6] Is it the policy of the federal courts exercising pendent jurisdiction to so stifle the development of state substantive law protecting employees? The answer currently depends upon the circuit in question.

Finally, SCE criticizes the petitioners for failing to advise the Court as to two circuit court opinions "in total *harmony*" with the Ninth Circuit's opinion here. Brief in Opp. at 9. Again, SCE's view of "harmony" relates only to the bottom line result. In *Strachan v. Union Oil Co.*, 768 F.2d 703 (5th Cir. 1985), and *Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253 (4th Cir. 1987), the circuit courts held that certain state law privacy claims were preempted. However, both *Strachan* and *Kirby* pre-date this Court's decisions in *Lingle* and *Caterpillar*; contain rationale inconsistent with the rationale of *Lingle* and *Caterpillar*; and are, therefore, wrongly decided under the Court's current analysis. Thus, to the extent that they misapply the law to reach an erroneous result, *Strachan* and *Kirby* are "in total *har-*

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[6] The Court's discussion of Illinois precedent respecting the tort of retaliatory discharge for filing a worker's compensation claim served two useful purposes: (1) it demonstrated the irrelevance of the collective bargaining agreement to the *elements* of the claim, and (2) it filled a statutory void in that the Illinois cause of action is not based upon any specific statutory provision. *Lingle*, 108 S.Ct. at 1882-82. The discussion did not, however, have as its purpose the imposition of a requirement that any such state law claim must be "well-established" or suffer extinction in the face of a collective bargaining agreement.

mony" with the Ninth Circuit's opinion here. But as regards *Lingle* and *Caterpillar*, they offer only dissonance.

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Dated: March 1, 1989